No. 93-1841-CFX
Status: GRANTED

Title: Adarand Constructors, Inc., Petitioner
v.
Federico Pena, Secretary of Transportation, et al.

Docketed:
May 17, 1994

Court: United States Court of Appeals for the Tenth Circuit

Counsel for petitioner: Pendley,William Perry

Counsel for respondent: Solicitor General

Ptn due & mld 5-17-94, see ml label re dkt dt.

Entry	Date	Note	Proceedings and Orders
1	May 17 1994	G	Petition for writ of certiorari filed.
3	Jun 14 1994		Order extending time to file response to petition until July 22, 1994.
4	Jul 22 1994		Order further extending time to file response to petition until August 5, 1994.
5	Aug 5 1994		Brief of respondents Federico Pena, Secretary, et al. in opposition filed.
6	Aug 10 1994		DISTRIBUTED. September 26, 1994 (Page 93)
7	Aug 30 1994	X	Reply brief of petitioner filed.
8	Sep 26 1994		Petition GRANTED. The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, November 8, 1994. The brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, December 6, 1994. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, December 20, 1994. Rule 29.2 does not apply. **********
9	Nov 7 1994		Joint appendix filed.
10	Nov 7 1994		Brief of petitioner Adarand Constructors, Inc. filed.
11	Nov 7 1994		Brief amicus curiae of Associated General Contractors of America, Inc. filed.
12	Nov 7 1994		Brief amicus curiae of Pacific Legal Foundation filed.
13	Nov 8 1994		Brief amici curiae of Washington Legal Foundation, et al. filed.
14	Nov 8 1994		Brief amicus curiae of Atlantic Legal Foundation filed.
15	Nov 8 1994		Brief amici curiae of The Federalist Society, et al. filed.
16	Nov 14 1994		Record filed.
		*	Partial record proceedings United States Court of Appeals for the Tenth Circuit.
17	Nov 14 1994		SET FOR ARGUMENT TUESDAY, JANUARY 17, 1995. (1ST CASE).
18	Nov 14 1994	G	Motion of L.S. Lee, Inc., et al. for leave to file brief amicus curiae out-of-time filed.
19	Nov 18 1994		CIRCULATED.
20	Nov 28 1994		Motion of L.S. Lee, Inc., et al. for leave to file brief amicus curiae out-of-time GRANTED.
22	Dec 5 1994	X	Brief amicus curiae of Latin American Management Association filed.
23	Dec 5 1994	X	Brief amicus curiae of NAACP Legal Defense and Educational Fund, Inc. filed.

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Entry	Date	Note	Proceedings and Orders
37	Dec 5 1994	X	Brief amici curiae of Coalition for Economic Equity, et al. filed.
39	Dec 5 1994		LODGING consisting of one set of four documents submitted by counsel for the Coalition for Economic Equity, et al.
21	Dec 6 1994	X	Brief of respondents Federico Pena, Secretary, et al. filed.
25	Dec 6 1994	X	Brief amicus curiae of Equality in Enterprise Opportunities Association, Inc. filed.
26	Dec 6 1994	X	Brief amici curiae of National Bar Association, et al. filed.
27	Dec 6 1994	X	Brief amicus curiae of Congressional Black Caucus filed.
28	Dec 6 1994	X	Brief amici curiae of Minority Business Enterprise Legal Defense Fund, et al. filed.
29	Dec 6 1994	X	Brief amici curiae of Congressional Asian Pacific American Caucus, et al. filed.
30	Dec 6 1994	X	Brief amicus curiae of National Association for the Advancement of Colored People filed.
31	Dec 6 1994	X	Brief amici curiae of Lawyers Committee for Civil Rights Under Law, et al. filed.
32	Dec 6 1994	X	Brief amicus curiae of National Association of Minority Businesses filed.
33	Dec 6 1994	X	Brief amicus curiae of National Coalition of Minority Businesses filed.
34	Dec 6 1994	X	Brief amici curiae of Minority Media and Telecommunications Council, et al. filed.
35	Dec 6 1994	X	Brief amici curiae of Maryland, et al. filed.
36	Dec 6 1994		LODGING consisting of three documents submitted by counsel for amici Maryland, et al.
38	Dec 9 1994	G	Motion of Maryland Women Business Entrepreneurs, et al. for leave to file a brief as amici curiae filed.
40	Dec 13 1994	D	Motion of petitioner to strike Appendices B and C of respondents' brief filed.
42	Dec 20 1994	X	Reply brief of petitioner filed.
43	Dec 21 1994		Opposition of respondents to motion of petitioner to strike Appendices B and C of respondents' filed.
46	Dec 23 1994	D	Motion of Maryland Women Business Entrepreneurs Association, et al. for leave to participate in oral argument as amici curiae filed.
44	Dec 29 1994		Record filed.
		*	Original record proceedings United States District Court for the District of Colorado (BOX)
45	Jan 3 1995		DISTRIBUTED. January 6, 1995
47	Jan 9 1995		Motion of Maryland Women Business Entrepreneurs, et al. for leave to file a brief as amici curiae GRANTED.
48	Jan 9 1995		Motion of petitioner to strike Appendices B and C of respondents' brief DENIED.
49	Jan 17 1995		Motion of Maryland Women Business Entrepreneurs Association, et al. for leave to participate in oral argument as amici curiae DENIED.
50	Jan 17 1995		ARGUED.

(1)

Supreme Court, U.S.
FILED

93184-1 MAY 17 1994

No. _____

OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1993

ADARAND CONSTRUCTORS, INC.,

Petitioner,

v.

FEDERICO PENA, Secretary of Department of Transportation; THOMAS D. LARSEN, Administrator of the Federal Highway Administration; LOUIS N. MACDONALD, Administrator Region VIII of the Federal Highway Administration; and JERRY BUDWIG, Division Engineer of the Central Federal Lands Highway Division,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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83 pp

ISSUES PRESENTED

1. Whether a congressional race-based set aside program for awarding highway construction contracts survives an as applied constitutional challenge when that program seeks to remedy alleged broad-based societal discrimination, rather than clearly identifiable discrimination perpetuated by the governmental entity seeking to remedy the discrimination?

2. Whether "strict scrutiny," as opposed to "a lenient standard, resembling intermediate scrutiny," is the proper standard of review for determining the constitutionality of a race-based, program adopted by Congress?

3. Whether the Fifth Amendment requires a federal agency, in implementing a federal race-based, set aside program and when exceeding the goals adopted by Congress, to conduct the inquiry set forth in *City of Richmond v. J.A. Croson, Co.*, 488 U.S. 469 (1989)?

LIST OF PARTIES

Adarand Constructors, Inc. ("Adarand") was Plaintiff in the United States District Court for the District of Colorado and Appellant before the United States Court of Appeals for the Tenth Circuit. Adarand is a corporation organized under the laws of the State of Colorado. Adarand has no parent or subsidiary corporations.

The following were Defendants in the United States District Court for the District of Colorado and Appellees before the United States Court of Appeals for the Tenth Circuit: Samuel K. Skinner, in his official capacity as Secretary of the Department of Transportation (Mr. Skinner has since been replaced in his official capacity by Federico Pena); Robert E. Farris, in his official capacity as Administrator of the Federal Highway Administration (Mr. Farris has since been replaced in his official capacity by Thomas D. Larsen); Louis N. MacDonald, in his official capacity as Administrator of Region VIII of the Federal Highway Administration; and Jerry Budwig, in his official capacity as Division Engineer of the Central Federal Lands Highway Division.

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No. _____

In The

Supreme Court of the United States

October Term, 1993

ADARAND CONSTRUCTORS, INC.,

Petitioner,

v.

FEDERICO PENA, Secretary of Department of Transportation; THOMAS D. LARSEN, Administrator of the Federal Highway Administration; LOUIS N. MACDONALD, Administrator Region VIII of the Federal Highway Administration; and JERRY BUDWIG, Division Engineer of the Central Federal Lands Highway Division,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

Review is sought of the, as yet unpublished, opinion of the Tenth Circuit Court of Appeals, dated February 16, 1994, appearing at pages App. 1 to App. 26 of the Appendix. The opinion and order of the District Court, dated April 21, 1992, *Adarand Constructors, Inc. v. Skinner*, 790 F.

Supp. 240 (D.Colo. 1992), appear at pages App. 26 to App. 38 of the Appendix.

JURISDICTION

Petitioner seeks review of the opinion and judgment issued by the Tenth Circuit Court of Appeals on February 16, 1994. The Supreme Court has jurisdiction to review this opinion pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth and Fourteenth Amendments to the U.S. Constitution are at issue in this Petition for *Writ of Certiorari*.

STATUTE INVOLVED

The statute involved in this appeal is §502 of the Small Business Act, 15 U.S.C. §644(g). App. 39 to 40.

STATEMENT OF THE CASE

On August 10, 1990, Adarand Constructors, Inc. filed an action in the United States District Court for the District of Colorado challenging the use, by the Central Federal Lands Highway Division (CFLHD), of a contract provision referred to as the "Subcontracting Compensation Clause" (SCC). The express purpose of the SCC is to

induce prime contractors on federal highway projects to hire subcontractors based upon the race or gender of the owners rather than the amount of the bids of those subcontractors. The SCC authorizes bonus payments to the prime contractors as the mechanism to induce the award of subcontracts to minorities and women.[1]

This case presents a challenge to the Small Business Act of 1953, as amended (SBA), 15 U.S.C. §631 *et seq.*, which provides the sole source of statutory authority for the SCC program.[2] Adarand asserts that the SCC program adopted in accordance with the SBA, violates the right of equal protection guaranteed by the Fourteenth Amendment, as incorporated by the Fifth Amendment. Adarand further asserts that the SCC program violates the privileges and immunities secured by 42 U.S.C. §1983 and 42 U.S.C. §2000(d).[3]

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[1] The size of the bonus offered under the SCC program equals 10% of the final amount of the Disadvantaged Business Enterprise ("DBE") subcontracts, not to exceed 2% of the final prime contract amount (1.5% if the prime contractor only contracts with one DBE subcontractor). Moreover, the CFLHD requires prospective prime contractors to include a bid item amount to be awarded to the prime contractor under the SCC program regardless of whether the prime contractors intend to collect that money. Thus, a prime contractor cannot gain an advantage over other prime contractors by agreeing to forego the benefits available under the SCC.

[2] A second statute, the Surface Transportation and Uniform Relocation Assistance Act of 1987 (STURAA), Pub. L. 100-17, 101 Stat. 132 (1987), is implicated only in that it provided the funding for the construction project at issue in this case, the West Dolores Project. Adarand does not challenge the constitutionality of STURAA in this case.

[3] Different from other cases recently presented to this Court to resolve these and other concerns regarding the issue of

Cross Motions For Summary Judgment were filed on April 24, 1991. On April 21, 1992, the District Court issued an opinion and order denying Adarand's Motion For Summary Judgment and granting the United States' Motion For Summary Judgment.

On August 5, 1992, after obtaining a timely Motion For Extension Of Time To File Appeal, Adarand filed a Notice Of Appeal with the Tenth Circuit Court of Appeals. The matter was decided in an opinion dated February 16, 1994. This Petition for *Writ of Certiorari* follows.

STATEMENT OF FACTS

Adarand is a highway construction company. Randy Pech, who is a white male, is part owner and serves as general manager of Adarand. In this capacity, he is responsible for the company's day-to-day operations.

The CFLHD is an agency within the United States Department of Transportation (DOT). Its function is to supervise the construction and maintenance of highways on federally-owned lands within its geographic region.[4]

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the use of race in federal decision making, Adarand has not stipulated that the underlying statute is constitutional. Adarand has challenged the statute and the SCC program upon which it is based both facially and as applied.

[4] The geographic region of the CFLHD includes all or part of the following states: Colorado, Nebraska, North Dakota, California, Wyoming, Utah, Arizona, New Mexico, Texas, South Dakota, Nevada, Kansas, and Hawaii.

On August 10, 1989, the CFLHD issued a solicitation for bids for the construction of a 4.7 mile section of highway to be located in the San Juan National Forest (the West Dolores Project) in southern Colorado. Section 108 of the contract for the West Dolores Project is the "Subcontracting Compensation Clause." The SCC pays a monetary bonus to all prime contractors who hire "disadvantaged" subcontractors to perform work constituting more than 10% of the overall contract amount.

On September 15, 1989, the CFLHD awarded the prime contract for the West Dolores Project to Mountain Gravel & Construction Company (Mountain Gravel). Shortly thereafter, Adarand submitted the lowest bid for the guardrail portion of the project to Mountain Gravel. However, Mountain Gravel awarded the subcontract to a certified DBE, the Gonzales Construction Company. The sole reason for the decision of Mountain Gravel to award the subcontract to the Gonzales Construction Company, rather than to Adarand, was to obtain the $30,000.00 bonus payment from the CFLHD.

The CFLHD highway contracting program has, as its statutory basis, the SBA, which applies to all federal procurement activities and requires the President to set an annual "goal" of awarding not less than 5% of all contracts to small businesses owned and controlled by "socially and economically disadvantaged individuals." 15 U.S.C. §644(g)(1). However, the SBA also provides:

> Notwithstanding the Government-wide goal, each agency shall have an annual goal that presents, for that agency, the maximum practicable opportunity for . . . small business concerns

> owned and controlled by socially and economically disadvantaged individuals to participate in the performance of contracts let by such agency.

Id. The term "socially and economically disadvantaged individuals" is also defined by the statute.[5]

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[5] As used in this contract, the term "small business concern" shall mean a small business as defined pursuant to section 3 of the Small Business Act and relevant regulations promulgated pursuant thereto. The term "small business concern owned and controlled by socially and economically disadvantaged individuals" shall mean a small business concern –

> (i) which is at least 51 per centum owned by one or more socially and economically disadvantaged individuals; or, in the case of any publicly owned business, at least 51 per centum of the stock of which is owned by one or more socially and economically disadvantaged individuals; and
> (ii) whose management and daily business operations are controlled by one or more of such individuals.

The contractor shall presume that socially and economically disadvantaged individuals include Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities, or any other individual found to be disadvantaged by the Administration pursuant to section 8(a) of the Small Business Act.

15 U.S.C. §637(d)(3)(C). Businesses owned or operated by white males are not presumed to be "disadvantaged."

REASONS FOR GRANTING THE WRIT

I. A TRUE, DIRECT, AND IRRECONCILABLE CONFLICT EXISTS BETWEEN THE DECISION BELOW AND DECISIONS RENDERED BY THIS HONORABLE COURT.

A. THE DECISION OF THE TENTH CIRCUIT COURT OF APPEALS, THAT THE PROPER STANDARD OF REVIEW OF A RACE-BASED CONGRESSIONALLY-MANDATED PROGRAM IS "INTERMEDIATE SCRUTINY," IS IN DIRECT CONFLICT WITH DECISIONS OF THIS HONORABLE COURT.

The Tenth Circuit Court of Appeals applied an improper standard of review to the race-based program challenged herein:

> [I]f Congress has expressly mandated a race-conscious program, a court must apply a lenient standard, resembling intermediate scrutiny, in assessing the program's constitutionality.

App. 15. The Court reached its conclusion by combining the opinion authored by Chief Justice Burger with the concurring opinion authored by Justice Marshall.[6] This holding of the Tenth Circuit is in conflict with the decisions of this Honorable Court. A "lenient standard, resembling intermediate scrutiny" is not the standard set forth by a majority of the Justices in the *Fullilove* decision,

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[6] "A majority of the [*Fullilove v. Klutznick*, 448 U.S. 448 (1980)] Court agreed that strict scrutiny is not the proper test for evaluating a race-conscious remedial program authorized by an act of Congress." App. 15, fn. 10.

nor is it the standard set forth in previous or later decisions of this Court.[7]

Although there is some question regarding whether Chief Justice Burger's opinion was based upon a "strict scrutiny" standard,[8] he clearly required use of a standard higher than intermediate scrutiny:

> We recognize the need for *careful judicial evaluation* to assure that any congressional program that employs racial or ethnic criteria to accomplish the objective of remedying the present effects of past discrimination is *narrowly tailored* to the achievement of that goal.

Fullilove, 448 U.S. at 480. (Emphasis added.) Furthermore Chief Justice Burger wrote:

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[7] The concurring opinion authored by Justice Marshall supports an "intermediate scrutiny" standard for the *Fullilove* factual situation because Justice Marshall rejected both "strict scrutiny" and "the minimally rigorous rational-basis standard of review." *Fullilove*, 448 U.S. at 519. The constitutional test is met, wrote Justice Marshall, when the program is "designed to further remedial purposes [which] serve important governmental objectives and are substantially related to achievement of those objectives." *Fullilove*, 448 U.S. at 519. But Justice Marshall was joined by only two other Justices, *i.e.* Justice Brennan and Justice Blackmun.

[8] "The principal opinion in *Fullilove*, written by Chief Justice Burger, did not employ 'strict scrutiny'. . . . " *Croson*, 488 U.S. at 487. Although this part of the decision was authored by Justice O'Connor, it should be noted that the language from this portion of the *Croson* decision did not draw support from a majority of the Court.

> *Any preference* based on racial or ethnic criteria must necessarily receive a *most searching examination* to make sure that it does not conflict with constitutional guarantees.

Fullilove, 448 U.S. at 491. (Emphasis added.) "Careful judicial evaluation," "narrow tailor[ing]" and "most searching examination" indicate a level of scrutiny much closer to "strict scrutiny" than to "intermediate scrutiny."

Chief Justice Burger set forth a two step analysis for reviewing the Public Works Employment Act (PWEA) program reviewed in *Fullilove*. However, there is nothing in that analysis from which to infer that he intended any standard other than strict scrutiny. In fact, just the opposite is true as shown by the language quoted above and by the second step of Chief Justice Burger's analysis:

> the limited use of racial and ethnic criteria in the context presented, is a constitutionally permissible *means* for achieving the congressional objectives and does not violate the equal protection component of the Due Process Clause of the Fifth Amendment.

Fullilove, 448 U.S. at 473. (Emphasis in original.)

This Honorable Court has always used "the most rigid scrutiny" in considering "violation[s] [of] the equal protection component of the Due Process Clause of the Fifth Amendment." *Korematsu v. United States*, 323 U.S. 214, 216 (1944).[9] "Most rigid scrutiny" is "strict scrutiny."

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[9] "[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect. It is not to say that all such restrictions are unconstitutional. It is to say that *courts*

Even Justice Marshall, in his concurring opinion in *Fullilove*, recognized that the "conventional" test is "strict scrutiny." *Fullilove*, 448 U.S. at 519.

The standard of review articulated by Chief Justice Burger was not, contrary to the holding of the Tenth Circuit, "a lenient standard, resembling intermediate scrutiny," but rather the "conventional" "strict scrutiny" standard.[10] Therefore, the Tenth Circuit's opinion is in

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must subject them to the most rigid scrutiny." Korematsu v. United States, 323 U.S. at 216. (Emphasis added.) *See also University of California Regents v. Bakke*, 438 U.S. 265, 299 (1978) (when decision making touches upon an individual's race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear because of his race or ethnic background is precisely tailored to serve a compelling governmental interest); *Virginia v. Loving*, 388 U.S. 1, 11 (1967) (the Equal Protection Clause demands that racial classifications be subjected to the "most rigid scrutiny"); and *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954) ("[c]lassifications based solely upon race must be scrutinized with particular care since they are contrary to our traditions and hence constitutionally suspect").

[10] The conclusion that Chief Justice Burger's standard of review is the conventional standard or strict scrutiny is bolstered by the concurring opinion of Justice Powell.

> Although I would place greater emphasis than the Chief Justice on the need to articulate judicial standards of review in conventional terms, I view his opinion announcing the judgment as substantially in accord with my own views. Accordingly, I join that opinion and write separately to apply the analysis set forth by my opinion in *University of California Regents v. Bakke*, 438 U.S. 265 (1978).
>
> * * *
>
> [The PWEA] employs a racial classification that is constitutionally prohibited unless it is a necessary

conflict with the decisions of this Honorable Court when the Tenth Circuit holds that "[a] majority of the *Fullilove* Court believed that an intermediate scrutiny analysis should be used to determine whether a congressionally-mandated program passes constitutional muster." App. 16, (continuation of fn. 10).

The Tenth Circuit held that *Metro Broadcasting v. FCC*, 497 U.S. 547, 564 (1990):

> put to rest any lingering doubts about the continuing vitality of *Fullilove*: . . . "that race-conscious classifications adopted by Congress to address racial and ethnic discrimination are subject to a different standard than such classifications prescribed by state and local governments."

App. 19. The Tenth Circuit then concluded:

> the *Metro Broadcasting* majority held that even non-remedial race-conscious measures mandated by Congress are constitutionally permissible if they satisfy intermediate scrutiny.

App. 19. Again the holding of the Tenth Circuit is in conflict with the decisions of this Honorable Court.

> means of advancing a *compelling governmental interest*. (Citing *Bakke*) For the reasons stated in my *Bakke* opinion, I consider adherence to this standard as important and consistent with precedent.
>
> * * *
>
> Racial classifications must be assessed under *the most stringent level of review*. . . .

Fullilove, 448 U.S. at 496. (J. Powell, concurring.) (Emphasis added.) Compelling governmental interest and the most stringent level of review are "strict scrutiny."

Only four Justices in *Metro Broadcasting* agreed "that race-conscious classifications adopted by Congress to address racial and ethnic discrimination are subject to a different standard than such classifications prescribed by state and local governments" and that "intermediate scrutiny" is the proper standard of review. Four Justices do not constitute a majority holding.[11]

Justice Stevens' concurring opinion can not be cited as a basis for weakened scrutiny since he demands that the reasons for racial classifications be "clearly identified and unquestionably legitimate." *Metro Broadcasting v. FCC*, 497 U.S. at 601, citing his dissenting opinion in *Fullilove*. In his dissenting opinion in *Fullilove*, Justice Stevens wrote "[u]nless Congress clearly articulates the need and basis for a racial classification, and also tailors the classification to its justification, the Court should not uphold this kind of statute." *Fullilove*, 448 U.S. at 545 (Justice Stevens dissenting).[12] Since Justice Stevens dissented in *Fullilove* and Justice Marshall concurred, it cannot be argued that Justice Stevens' view of the proper

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[11] Those four justices were Brennan, White, Marshall and Blackmun. Justice Stevens wrote a concurring opinion by which he joined in the decision, but through which he set forth a different standard of review from the standard set forth by Justice Brennan. Justice Stevens' standard of review is much closer to "strict scrutiny" than to "intermediate scrutiny." *Metro Broadcasting v. FCC*, 497 U.S. at 601-602 (concurring opinion of Justice Stevens).

[12] Congress has done neither. It has not "clearly articulate[d] the need and basis for [the] racial classification" and has not "tailor[ed] the classification to its justification." "The Court should not uphold this . . . statute." *Fullilove*, 448 U.S. at 545 (Justice Stevens dissenting).

standard of review is the same as that set forth by Justice Marshall in *Fullilove*.

While Justice Stevens listed several situations where race-based measures are "unquestionably legitimate," the list does not include highway construction or government contracts. *Metro Broadcasting*, 497 U.S. at 601-602.[13] Justice Stevens' failure to include contracting as an "unquestionably legitimate" race-based measure and his dissent in *Fullilove* appear to manifest his view that contracting requires a different level of scrutiny than, for example, public broadcasting, and that congressionally-mandated public works laws are subject to a more rigorous standard of review, *i.e.* strict scrutiny.

As this Court has held on numerous occasions, strict scrutiny is the only standard of review to be applied to race-based programs like the one at issue in this case, even if the program is mandated by Congress. Since the decision of the Tenth Circuit is in direct, intolerable and irreconcilable conflict with the decisions of this Honorable Court regarding the proper standard of review for race-based programs, it is imperative that this Honorable Court grant this *Writ of Certiorari* to resolve the conflict.

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[13] That list is "extremely narrow" and includes "broadcast diversity"; "an integrated police force"; "a public school faculty"; and "the student body of a professional school." *Metro Broadcasting*, 497 U.S. at 601-602.

B. THE DECISION OF THE TENTH CIRCUIT COURT OF APPEALS, REGARDING THE "PRINCIPAL LESSON OF *FULLILOVE*," IS IN DIRECT CONFLICT WITH THIS COURT'S DECISION IN *FULLILOVE*.

The Tenth Circuit held:

> The splintered *Fullilove* Court did not uphold the challenged federal program *because* a specific percentage set-aside was mandated by Congress, but rather because the program, *in spite* of the racial and ethnic preference, satisfied equal protection requirements. 448 U.S. at 480 (Opinion of Burger, C.J.) In reaffirming *Fullilove* as the proper standard for assessing the constitutionality of benign race-conscious measures, the Court in *Metro Broadcasting* noted that, notwithstanding the "'great weight'" given to the decisions of Congress, even congressionally-mandated benign race-conscious measures must satisfy equal protection requirements. 110 S. Ct. at 3011 (citation omitted).

App. 21-22. (Emphasis in original.) The Tenth Circuit opinion is in error and is in direct conflict with decisions of this Honorable Court.

1. THE STATUTE IN QUESTION CONTAINS NO WAIVER PROVISION AS REQUIRED BY THE DECISIONS OF THIS COURT.

In *Fullilove*, in response to a facial challenge of a race-based, set-aside program, this Court upheld the constitutionality of that federal program. However, the federal program was upheld, in large part, because of the flexible nature of the program, specifically a "waiver" provision

allowing states to opt out of the race-based, set-aside federal program "where application of the program is not feasible." *Fullilove*, 448 U.S. at 468; *see Croson*, 488 U.S. at 488-489.[14]

This Court has established the need for a waiver provision if a race-based program is to withstand constitutional scrutiny. As noted in *Croson*, it was the presence of the waiver provision which ensured the constitutionality of the PWEA when challenged, facially, in *Fullilove*.[15] Thus, the waiver provision does not exist for administrative tidiness and nicety, but to ensure that the only basis that permits resort to a race-based standard – that is, to remedy prior state-sponsored discrimination – is not circumvented. This Court held that the waiver provision was to be used to prevent the unconstitutional application of the race-based remedy set forth in the PWEA.[16]

There is no waiver or similar provision in the Small Business Act (15 U.S.C. §644(g)) or the SCC. As noted by the Tenth Circuit:

> The Small Business Act provides the statutory authority for agencies to establish specific utilization goals for disadvantaged small businesses. 15 U.S.C. §644(g). In compliance with section 502 of the Small Business Act, the heads of the various federal agencies, including the DOT,

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[14] "[A]n amorphous claim that there has been past discrimination in a particular industry cannot justify the use of an unyielding racial quota." *Croson*, 488 U.S. at 499.

[15] *Croson*, 488 U.S. at 489.

[16] *Fullilove*, 448 U.S. at 481-482.

> *must* establish annual goals for small business participation in federal procurement contracts. *Id.* §644(g)(2). These goals *must* present the "maximum practicable opportunity" for small business concerns, including those "owned and controlled by socially and economically disadvantaged individuals." *Id.* §644(g)(1).

App. 5-6. (Emphasis added.) The continued use of the word "shall" throughout the statute and the Tenth Circuit's use of the word "must" underscores the inflexibility of this race-based program. There is no language in the SBA or the SCC which can be construed as a waiver provision, let alone specific language which meets the standard required by *Fullilove*.[17]

Since the statute in question contains no "waiver" provision, the decision of the Tenth Circuit that this program passes constitutional muster is in direct conflict with the decisions of this Honorable Court. Therefore, this Petition should be granted to remedy the conflict.

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[17] The Tenth Circuit states: "Because Adarand stipulates that section 502 satisfies the evidentiary requirements of *Fullilove*, the only question to be resolved is whether the SCC program implemented by the CLFHD is narrowly tailored to achieve the remedial purpose of section 502." App. 22. This is a mischaracterization of Adarand's Reply Brief. The Brief states: "Adarand concedes, *for the sake of discussion*, that the evidence is sufficient to satisfy the evidentiary requirements of *Fullilove*. However this concession is not enough to save the Federal Defendants' argument." App. 43. (Emphasis added.) By adding the language "for the sake of discussion," Adarand was stating that for purposes of the discussion it could be assumed that the evidence met the requirements of *Fullilove*. This is much different from a stipulation. Adarand simply did not stipulate as indicated by the opinion of the Tenth Circuit.

2. THE STATUTE IN QUESTION IS NOT "NARROWLY TAILORED" AS REQUIRED BY DECISIONS OF THIS COURT.

To pass constitutional scrutiny, the governmental body using the race-based remedy must show a "compelling governmental interest." In addition, the use of the limited race-based program must be "narrowly tailored" to meet the "compelling governmental interest" thus identified. In spite of the decisions of this Court, the Tenth Circuit held that the "*significant governmental purpose* of providing subcontracting opportunities for small disadvantaged business enterprises" meets the test. App. 23. (Emphasis added.) There are several problems with this holding. First, "significant governmental purpose" is not what the government must show. The proper standard to be met, according to the decisions of this Court is a "compelling governmental interest." There is no "compelling governmental interest" identified for the use of a race-based program in the SBA.[18]

Furthermore, the statute in question is not narrowly tailored. Narrow tailoring requires that the race-based remedy "will not last longer than the discriminatory effects it is designed to eliminate." *Fullilove*, 448 U.S. at 523 (Powell, concurring). In other words, the CFLHD must, as a result of the Fifth and Fourteenth Amendments, determine whether the means chosen to effectuate a clearly identified

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[18] "[A] generalized assertion that there has been past discrimination in an entire industry provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy. It 'has no logical stopping point.' " *Croson*, 488 U.S. at 498.

compelling governmental interest are "narrowly tailored to the achievement of that goal," that is, "limited in scope and duration." *Wygant v. Jackson Board of Education, et al.*, 476 U.S. 267, 285 (1986).

In finding the PWEA program challenged in *Fullilove* constitutional, Chief Justice Burger focused on the fact that the program under review was "a short-term measure to alleviate the problem of national unemployment." *Fullilove*, 448 U.S. at 457.[19] Without a statutory provision establishing a limited time period for the use of the race-based remedy, the program cannot be said to be narrowly tailored.

The statute challenged in this Petition has been in place since 1968 and shows signs of lasting forever.[20] The

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[19] "The MBE provision may be viewed as a pilot project, appropriately limited in extent and duration. . . . " *Fullilove*, 448 U.S. at 489 (Opinion of Burger, C.J.) "The . . . set-aside is not a permanent part of federal contracting requirements. As soon as the PWEA program concludes, this set-aside program ends. The temporary nature of this remedy ensures that a race-conscious program will not last longer that the discriminatory effects it is designed to eliminate." *Fullilove*, 448 U.S. at 513 (Concurring opinion of Powell, J).

[20] Not only does that program appear to be here to stay, it is also a "monster" program. The statute requires a minimum of 5% for minority participation in all of the federal government's procurement activities and demands that the level of participation be established at "the maximum practicable opportunity" for DBEs, which could represent up to 100% of the total federal government procurement contracts. Even 5% has to represent billions of dollars which are awarded based on race. Obviously, this program is in conflict with this Court's opposition to race-based programs which are "ageless in their reach into the past, and timeless in their ability to affect the future." *Wygant*, 476

law contains no automatic sunset provision and there is no reason to believe that the matter will be revisited by Congress in the near future, as indicated by the Tenth Circuit:

> [T]he SCC program is "appropriately limited in extent and duration" because federal procurement and construction contracting practices are subject to regular "reassessment and reevaluation by Congress."

App. 23. If this statement is true then every action of Congress is "appropriately limited in extent and duration." This does not provide the protection this Court has held that the Constitution requires.

A second aspect of narrow tailoring is that the program must be designed to remedy clearly identifiable discrimination.[21] Yet, since there are no findings that identify the discrimination this program seeks to remedy,[22] it suffers from the same problem Justice O'Connor identified in *Croson*:

U.S. at 276. Mr. Budwig: "I'm not aware that [the Government's DBE program's] end is in sight." App. 46-47.

[21] "This Court never has held that societal discrimination alone is sufficient to justify a racial classification. Rather, the court has insisted upon some showing of prior discrimination by the governmental unit involved before allowing limited use of racial classifications in order to *remedy* such discrimination." *Wygant*, 476 U.S. at 274. (Emphasis added.)

[22] This is the a problem recognized by Justice Powell in his concurring opinion in *Fullilove*:

> Although the set-aside is pegged at a reasonable figure, its effect might be unfair if it were applied rigidly

> [I]t is almost impossible to assess whether the Richmond Plan is narrowly tailored to remedy prior discrimination since it is not linked to identified discrimination in any way.

Croson, 488 U.S. at 498.

Failure of this race-based program to provide the necessary flexibility, *i.e.* waiver, and a time limit for its use, proves that the program at issue is not narrowly tailored.

If the program is not narrowly tailored it is unconstitutional under the strict scrutiny standard required by the decisions of this Honorable Court. For these reasons this Petition must be granted.

C. THE HOLDING OF THE TENTH CIRCUIT COURT OF APPEALS THAT CONGRESS "CAN ENGAGE MORE FREELY IN AFFIRMATIVE ACTION THAN STATES AND LOCALITIES" IS IN CONFLICT WITH DECISIONS OF THIS COURT.

The Tenth Circuit held:

> The lesson that we glean from *Fullilove* and *Croson* is that the federal government, acting

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in areas of the country where minority group members constitute a small percentage of the population. *Fullilove*, 448 U.S. 514 (Justice Powell, concurring opinion). Colorado, the location of the contract at issue in this case fits within the areas of the country described by Justice Powell. Defendant Budwig testified he didn't believe there had ever been any discrimination in the highway construction industry in Colorado. App. 45-46.

> under congressional authority, can engage more freely in affirmative action than states and localities.

App. 18. This statement is in direct, true and irreconcilable conflict with the holdings of this Court:

> In view of our decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government.

Bolling v. Sharpe, 347 U.S. at 500. The holding of the Tenth Circuit with regard to the relationship of *Fullilove*, *Croson*, and *Metro Broadcasting* is in error. Since none of the opinions written in *Fullilove* was a plurality, let alone a majority opinion, *Fullilove* cannot be read to overrule previous Supreme Court precedence.

Although *Metro Broadcasting* had a plurality, it did not have the necessary majority to overrule prior Supreme Court precedence. Nor was *Bolling v. Sharpe*, addressed by Justice Brennan in the *Metro Broadcasting* case. This Honorable Court would not overrule such an important constitutional precedent by implication.

Finally, the portion of the *Croson* decision which is cited in *Metro Broadcasting* for the proposition that Congress is treated differently by the Constitution than other governmental bodies, was not a plurality opinion nor a majority opinion. There are no majority Supreme Court decisions that support the holding of the Tenth Circuit in the case at bar. The decision of the Tenth Circuit is clearly in conflict with *Bolling v. Sharpe*.

To resolve this true and direct conflict with *Bolling v. Sharpe*, this Petition must be granted.

II. THE DECISION OF THE TENTH CIRCUIT COURT OF APPEALS RAISES IMPORTANT CONSTITUTIONAL ISSUES.

This is an important challenge to the constitutionality of a race-based, set-aside program adopted by Congress.[23] It asks unanswered questions as to the exact relationship among the decisions of this Court in *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *City of Richmond v. J.A. Croson, Co.*, 488 U.S. 469 (1989) and *Metro Broadcasting v. FCC*, 497 U.S. 547, 564 (1990).

While *Fullilove* upheld, in strictly a facial challenge, the ability of Congress to adopt race-based, set-aside programs; while *Croson* struck down a race-based, set-aside program adopted by a city; and while *Metro Broadcasting*, appears to have established an intermediate standard of review for congressionally-mandated acts; unanswered are the questions regarding an "as applied" challenge posed by the instant Petition, which Chief Justice Burger stated in *Fullilove* would have to await future challenges.[24] This is that "future case[ ]."

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[23] "Under our Constitution, any official action that treats a person differently on account of his race or ethnic origin is inherently suspect and presumptively invalid." *Fullilove*, 448 U.S. at 523, (Justice Stewart, dissenting opinion).

[24] "We are not presented here with *a challenge involving a specific award of a construction contract* or the denial of a waiver request; such questions of specific application must await future cases." *Fullilove*, 448 U.S. at 486. (Emphasis added.)

This case presents the unanswered questions: (1) Whether, in a facial and as applied constitutional challenge, a law that is an equal protection violation when enacted by a state is transformed into an equal protection guarantee when enacted by Congress?[25] (2) Whether "strict scrutiny" as opposed to "a lenient standard, resembling intermediate scrutiny" is the proper standard of review for determining the constitutionality of a race-based program adopted by Congress? (3) Whether the Fifth Amendment requires a federal agency, in implementing a federal race-based, set aside program, to conduct the inquiry set forth in *City of Richmond v. J.A. Croson, Co.*, 488 U.S. 469 (1989), especially when the level of minority participation set by the agency far exceeds the level of participation required by Congress? At the time of the West Dolores contract award, the CFLHD's goal was set at 12% to 15% of its annual construction budget, that is, 7% to 10% higher than set by Congress in the SBA. App. 49.

Croson commands that a governmental unit, even if implementing a congressionally-mandated program, conduct an inquiry in order to ascertain that the

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[25] In stating a concern with the holding of the Court in *Fullilove*, Justice Kennedy, in a concurring opinion in *Croson*, stated: "The process by which a law that is an equal protection violation when enacted by a State becomes transformed to an equal protection guarantee when enacted by Congress poses a difficult proposition for me; but as it is not before us, any reconsideration of that issue must await some further case." *Croson*, 488 U.S. at 518.

implementation of a race-based program above that set by Congress meets the requirements of the Constitution.[26]

While the SBA may require the CFLHD to implement a race-based remedy, when the CFLHD exceeds that level, it must do so in a constitutional manner. The Fifth and Fourteenth Amendments to the U.S. Constitution compel the CFLHD to make the decision to raise the level at which the race-based quota is set in a constitutional manner. The constitutional method is set forth in *Croson*. The failure of the CFLHD to determine whether 12 to 15% as opposed to 5% was constitutionally permissible renders the CFLHD program unconstitutional.

This Court should grant certiorari in order to end the Constitutional abuse now sanctioned by the decision below.

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[26] As this Court made clear in *Croson*, a state must: (1) search for and find a history of state-sponsored discrimination; (2) assert the compelling state interest sought to be served by the race-based remedy; and (3) narrowly tailor the race-based remedy both as to: (a) the beneficiary of the racial bias, that is, applying the remedy to one who has been a victim of such state-sponsored discrimination; and (b) the duration of the race-based remedy. *Croson*, 488 U.S. 469.

CONCLUSION

For all of the above reasons, this Court should grant the petition of Adarand in this matter and review the erroneous decision of the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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Dated: May 17, 1994.

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

ADARAND CONSTRUCTORS, INC., a Colorado corporation, Plaintiff-Appellant v. FEDERICO PENA, Secretary of Department of Transportation; THOMAS D. LARSON, Administrator of the Federal Highway Administration; LOUIS N. MACDONALD, Administrator of Region VIII of the Federal Highway Administration; and JERRY BUDWIG, Division Engineer of the Central Federal Lands Highway Division, Defendants-Appellees	)	No. 92-1242

Appeal from the United States District Court
for the District of Colorado
(D.C. No. 90-C-1413)

(Filed Feb. 16, 1994)

William Perry Pendley, Mountain States Legal, Foundation (Todd S. Welch, John G. Nelson, with him on the brief), Denver, Colorado, for Plaintiff-Appellant.

Lisa J. Stark, Attorney, Civil Rights Division, United States Department of Justice (James P. Turner, Acting Assistant Attorney General, David K. Flynn, Lisa C. Wilson, Attorneys, Civil Rights Division, United States Department of Justice, on the brief), Washington, D.C., for Defendants-Appellees.

Before HOLLOWAY, GARTH* and McKAY, Circuit Judges.

GARTH, Circuit Judge.

This appeal involving a reverse discrimination challenge requires us to review the constitutionality of a federal program designed to provide contract awards for disadvantaged business enterprises.

Appellant Adarand Constructors, Inc. ("Adarand") appeals an order of the district court granting summary judgment in favor of the Government appellees [hereinafter "Government"]. 790 F. Supp. 240. On appeal, Adarand raises three arguments. First, it argues that the district court erred in holding that the proper standard to be applied is found in *Fullilove v. Klutznick*, 448 U.S. 448 (1980), rather than in *City of Richmond v. J.A. Croson, Co.*, 488 U.S. 469 (1989).

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* The Honorable Leonard I. Garth, Senior United States Circuit Judge, United States Court of Appeals for the Third Circuit, sitting by designation.

Second, relying on *Croson*, Adarand asserts that the Central Federal Lands Highway Division (CFLHD) must make specific findings of past discrimination in order to justify its reliance on the disadvantaged business enterprise (DBE) program which furnishes the necessary criteria for the federal agency's implementation of a race-conscious subcontracting compensation clause ("the SCC program").

Third, Adarand contends that section 502 of the Small Business Act, 15 U.S.C. § 644(g), which provides the statutory authorization for the challenged SCC program, is unconstitutional as applied because it impermissibly delegates to federal agencies the authority to develop minority-participation goals and the means for achieving those goals.

Our jurisdiction is invoked under 28 U.S.C. § 1291, and we affirmed the district court's judgment of April 21, 1992 for the Government. We do so, however, on grounds different from those relied upon by the district court.[1]

I.

Adarand, a highway construction company run by a white male, sought declaratory and permanent injunctive relief against officials of the federal Department of Transportation (DOT) and other DOT officials on the grounds that the SCC program utilized by the CFLHD violates the

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[1] *Helvering v. Gowran*, 302 U.S. 238, 245 (1937) ("[T]he rule is settled that if the decision below is correct, it must be affirmed, although the district court relied upon a wrong ground or gave a wrong reason").

equal protection guarantees of the Fifth and Fourteenth Amendments and the privileges and immunities guaranteed by 42 U.S.C. § 1983 and 42 U.S.C. § 2000d (Title VI).[2] Adarand's complaint erroneously alleged that the statutory authorization for the SCC program was provided by two transportation assistance acts: the Surface Transportation Assistance Act of 1982, Pub. L. No. 97-424, § 105(f), 96 Stat. 2097, 2100 (STAA), and its successor, the Surface Transportation and Uniform Relocation Assistance Act of 1987, Pub. L. No. 100-17, § 106(c), 101 Stat. 132, 145 (STURAA). Both Adarand and the Government filed cross motions for summary judgment with the district court. The district court also mistakenly determined that the challenged program was authorized by STAA and STURAA. For purposes of this appeal, both parties stipulate that the SCC program is authorized by section 502 of the Small Business Act, 15 U.S.C. § 644(g), and that the constitutionality of STAA and STURAA are not at issue.

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[2] For ease in reading the various references to acts and agencies referred to within this opinion, we list the following acronyms:

Central Federal Lands Highway Division	= CFLHD
Federal Lands Highway Program	= FLHP
Federal Highway Administration	= FHWA
Federal Department of Transportation	= DOT
Disadvantaged Business Enterprise	= DBE
Subcontracting Compensation Clause	= SCC
Surface Transportation Assistance Act of 1982	= STAA
Surface Transportation and Uniform Relocation Act of 1987	= STURAA

A.

The Small Business Act provides the statutory authority for agencies to establish specific utilization goals for disadvantaged small businesses. 15 U.S.C. § 644(g). In compliance with section 502 of the Small Business Act, the heads of the various federal agencies, including the DOT, must establish annual goals for small business participation in federal procurement contracts.[3] *Id.* § 644(g)(2). These goals must present the "maximum

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[3] Section 502 of the Small Business Act provides:

> The President shall annually establish Government-wide goals for procurement contracts awarded to small business concerns and small business concerns owned and controlled by socially and economically disadvantaged individuals. The Government-wide goal for participation by small business contracts shall be established at not less than 20 percent of the total value of all prime contract awards for each fiscal year. The Government-wide goal for participation by small business concerns owned and controlled by socially and economically disadvantaged individuals shall be established at not less than 5 percent of the total value of all prime contract and subcontract awards. *Notwithstanding the Government-wide goal, each agency shall have an annual goal that presents, for that agency, the maximum practicable opportunity for small business concerns and small business concerns owned and controlled by socially and economically disadvantaged individuals to participate in the performance of contracts let by such agency.* The Administration and the Administrator of the Office of Federal Procurement Policy shall, when exercising their authority pursuant to paragraph (2), insure that the cumulative annual prime contract goals for all agencies meet or exceed the annual Government-wide prime contract

practicable opportunity" for small business concerns, including those "owned and controlled by socially and economically disadvantaged individuals." *Id.* § 644(g)(1).

The SCC program was implemented in 1979 by the Federal Lands Highway Program (FLHP) of the Federal Highway Administration (FHWA), an agency within the DOT, to satisfy the agency goals requirement of the Small Business Act. CFLHD and the other two regional offices of FLHP utilize the SCC program as a means of meeting their respective apportioned shares of the DOT goal for disadvantaged small business participation. Under the SCC program, a Subcontracting Compensation Clause is included in small-value contracts or where the prime contractor is a small business. Prime contractors whose

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goal established by the President pursuant to this paragraph.

15 U.S.C. § 644(g)(1) (emphasis added). These obligations were first codified in 1978 as an amendment to the Small Business Act. *See* Pub. L. No. 95-507, 92 Stat. 1770.

Pursuant to 15 U.S.C. 644(g)(2):

> The head of each Federal agency shall, after consultation with the Administration establish goals for the participation by small business concerns, and by small business concerns owned and controlled by socially and economically disadvantaged individuals, in procurement contracts of such agency. *Goals established under this subsection* shall be jointly established by the Administration and the head of each Federal agency and *shall realistically reflect the potential of small business concerns and small business concerns owned and controlled by socially and economically disadvantaged individuals to perform such contracts and to perform subcontracts under such contracts.* * * *

Id. (emphasis added).

DBE subcontracts exceed 10% of the overall contract amount are eligible for incentive payments of up to 1.5% of the original contract amount for utilization of one DBE, or up to 2% for hiring two or more DBEs. Small business prime contractors are not required to hire DBEs as a contractual condition of eligibility for award of the prime contract. Rather, the SCC program provides prime contractors with the option of either hiring DBE subcontractors and receiving commensurate incentive payments, or ignoring the option entirely.

To qualify for eligibility under the SCC program, small businesses must demonstrate through an annual certification process that they are indeed socially and economically disadvantaged. The Subcontracting Compensation Clause and the eligibility criteria comport with section 502 of the Small Business Act. The eligibility criteria, however, are derived from the DBE regulatory program implemented pursuant to two transportation funding authority acts: STAA and its renewal act, STURAA.[4] A subcontractor thus qualifies for the SCC program if it qualifies for DBE status under STURAA regulations.

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[4] The regulations promulgated by the DOT following enactment of STAA in 1983 created the DBE regulatory program. Both STAA and STURAA were intended to achieve minority business participation goals primarily through the use of set-asides for qualified subcontractors. S. Rep. No. 4, 100th Cong., 1st Sess. 11-12 (1987), *reprinted in* 1987 U.S.C.C.A.N. 66, 76. STURAA allocates $55 million annually for forest highway construction projects undertaken by federal agencies. The bulk of funds appropriated under STURAA, however, is granted to state and localities for federally-assisted highway programs.

As an agency within the federal DOT, CFLHD is not itself subject to STURAA implementing regulations. *See* 54 Fed. Reg. 43835-01; 45 Fed. Reg. 21172 (1980); 49 C.F.R. 23.2. Consequently, small business prime contractors awarded contracts let directly by the CFLHD do not have to satisfy the 10% DBE set-aside required of states and localities who receive STURAA funds for federally-assisted highway contracts.

STURAA, and previously STAA, define "socially and economically disadvantaged individuals" with reference to the Small Business Act. 15 U.S.C. § 637(d).[5] Under the Small Business Act, a small business must be at least 51% owned and controlled by individuals who are socially and economically disadvantaged. *Id.* Members of certain minority racial and ethnic groups and women are presumed socially and economically disadvantaged.[6] *Id.* That

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[5] Under the Act, "[s]ocially disadvantaged individuals are those that have been subject to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities." 15 U.S.C. § 637(a)(5). "Economically disadvantaged individuals are those socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged." *Id.* § 637(a)(6)(A). These definitions also are incorporated into STAA and STURAA.

[6] These racial minority groups are: "Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities * * * ." 15 U.S.C. § 637(d)(3)(C). Both STURAA and the Small Business Act also extends federal procurement opportunities to women-owned small businesses.

presumption is rebuttable under the DBE criteria incorporated into CFLHD's SCC program. Both minority-owned small disadvantaged business enterprises (DBEs) and women-owned small business enterprises (WBEs) may be decertified if it can be established that they are not socially and economically disadvantaged. Non-minority-owned small businesses also are eligible for DBE certification by the Small Business Administration, provided that they satisfy the same eligibility criteria as minority-owned small businesses. *See* 15 U.S.C. § 637(a).

B.

On September 15, 1989, the CFLHD awarded a $1-million-plus prime contract to a small business contractor, Mountain Gravel & Construction Company, for a federal highway project in Colorado known as the West Dolores project.[7] Funding for the West Dolores project was allocated to CFLHD under STURAA. Because the contract was let by an agency within the DOT, Mountain Gravel was *not required* to hire DBEs as part of its contractual obligation for the West

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[7] CFLHD includes within its jurisdiction the following states: Arizona, California, Colorado, Hawaii, Kansas, Nebraska, Nevada, New Mexico, North Dakota, South Dakota, Texas, Utah and Wyoming. At the time of the contract award for the West Dolores Project, CFLHD's apportioned goal was between 12% and 15% DBE participation in all contracts let by the agency. The percentage goal represents the portion of dollars of CFLHD's total procurement program. Neither CFLHD nor any other federal agency is subject to sanctions for failing to satisfy its annual goal. The head of each federal agency, however, is required to justify any such failure in an annual report to the Small Business Administration. 15 U.S.C. § 644(h).

Dolores project. However, anticipating that Mountain Gravel would use DBEs as subcontractors, CFLHD followed its usual practice and added 1% of the bid as a contingent sum to the prime contractor's bottom-line bid. This contingent amount would be paid to the prime contractor only if 10% of the subcontracts on the West Dolores Project was with DBEs. The Subcontracting Compensation Clause included in the contract read:

> Monetary compensation is offered for awarding subcontracts to small business concerns owned and controlled by socially and economically disadvantaged individuals * * * Compensation is provided to the Contractor to locate, train, utilize, assist, and develop DBEs to become fully qualified contractors in the transportation facilities construction field. The Contractor shall also provide direct assistance to disadvantaged subcontractors in acquiring the necessary bonding, obtaining price quotations, analyzing plans and specifications, and planning and management of the work. * * * The Contractor will become eligible to receive payment under this provision when the dollar amount * * * of the DBE subcontract(s) awarded exceeds [10% for Colorado] of the original [prime] contract award.

Shortly thereafter, Adarand submitted a subcontract bid to Mountain Gravel seeking to construct the guardrail portion of the West Dolores project. Adarand is not a certified DBE.[8] Although Adarand was the lowest bidder, Mountain Gravel exercised the option provided by the

[8] The record gives no indication of the racial composition of Adarand's ownership, although its general manager is a white male and its stockholders include the general manager's wife and two other women.

SCC program and awarded the subcontract for the guardrail systems to a certified DBE who had submitted a higher bid than Adarand's. By subcontracting with the DBE, Mountain Gravel thereby became entitled to a bonus payment of approximately $10,000.

Adarand challenged the constitutionality of the SCC program in a lawsuit filed August 10, 1990. The complaint, *inter alia*, sought an injunction prohibiting further use of the SCC program. Believing that the SCC program was instituted pursuant to STAA and STURAA, Adarand's complaint attacked the constitutional validity, both facially and as applied, of those two transportation assistance acts. The complaint alleged that the use of race and gender as factors in awarding federal procurement contracts in Colorado, without any findings of past discrimination in the state, violated the equal protection guarantees of the Fifth and Fourteenth Amendments and the privileges and immunities guaranteed by 42 U.S.C. § 1983 and 42 U.S.C. § 2000d (Title VI).

In its brief in support of its cross motion for summary judgment, Adarand argued that CFLHD's use of the SCC program to facilitate federal contracting opportunities for DBEs could not withstand strict scrutiny under *Croson*. The Government countered in its brief that *Fullilove* (involving *federal* remedial programs), and not *Croson* (involving *state* and *local* entities), provided the controlling standard. The Government also argued that Adarand did not have standing, in any event, to challenge the regulatory program by which STURAA is implemented, because the SCC program was instituted pursuant to section 502 of the Small Business Act, 15 U.S.C. § 644(g), and not STURAA. In its reply brief,

Adarand acknowledged that the SCC program was implemented to response to the agency goals requirement of the Small Business Act.

Relying on the parties' briefs, the district court granted summary judgment in favor of the Government and denied Adarand's summary judgment motion. 790 F. Supp. at 245. The district court assumed, without explanation, that the case presented a challenge to the constitutionality of the DBE regulatory program promulgated under provisions of STAA and STURAA. *Id.* at 242. Its opinion did not address the standing issue urged upon us by the Government, and made no reference to the SCC program. The existence of the Small Business Act and the Act's mandate of agency goals for socially and economically disadvantaged small business participation were virtually ignored by the district court. Rather, the district court concluded, erroneously, that CFLHD "was required by the federal regulations under which CFLHD operates" to adopt STAA's and STURAA's 10% set-aside.[9] *Id.* at 244.

Based on its finding that "the challenged regulations and actions involve only federal actors acting pursuant to congressional mandate," the district court determined that the relaxed standard of *Fullilove* – and not the strict scrutiny test of *Croson* – governed this case. 790 F. Supp.

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[9] The 10% (7% for Wyoming) threshold of CFLHD's subcontracting compensation clause, although modeled on STURAA's set-aside, is an optional goal, not a set-aside. As discussed *supra* in text, it is entirely at the discretion of the prime contractor whether to exercise its option under the Subcontracting Compensation Clause, or to ignore it and forego the monetary reward CFLHD offers for hiring DBEs as subcontractors.

at 244. Applying *Fullilove* to the facts of this case, the district court found that congressional policies related to remedying discrimination supported the Government's position. Because "the challenged programs are narrowly tailored to achieve their legitimate purpose," the district court concluded that the challenged program satisfies the requirements of the Fifth and Fourteenth Amendments. *Id.* at 245.

II.

As a threshold matter, we reject the Government's argument that Adarand does not have standing to challenge section 502 of the Small Business Act, 15 U.S.C. § 644(g), because Adarand had not charged in its complaint that section 502 was unconstitutional. We are satisfied that Adarand is entitled to attack the constitutional validity of the legislation authorizing the very program which was challenged in its complaint, even though Adarand did not identify section 502.

Adarand and the Government, in their briefs to the district court, both identified section 502 as the statutory basis for the SCC program. As the Government itself points out, the analysis of the constitutionality of the SCC program under the authority of the Small Business Act is the same as that applied by the district court to STAA and STURAA. Furthermore, because we conclude that the district court reached the correct conclusion, its order denying Adarand's motion for summary judgment and granting summary judgment in favor of the Government can be affirmed, even though premised on an analysis different from the analysis we employ. *Helvering v.*

Gowran, 302 U.S. 238, 245 (1937), *reh'g denied*, 302 U.S. 781 (1938); *Robert-Gay Energy Enters., Inc. v. State Corp. Comm'n of Kansas*, 753 F.2d 857, 862 n.5 (10th Cir. 1985).

The Government is on firmer footing when it attacks Adarand's standing to challenge the provisions of the SCC program pertaining to women-owned business enterprises (WBE). The issue of whether a congressional mandate exists for WBEs as disadvantaged businesses under the SCC program also was raised in Adarand's complaint. Both parties, however, proceeded before the district court on the apparently shared assumption that the instant controversy concerned only the racial preference aspect of the SCC program. Because Adarand never argued the point in its motion for summary judgment, the district court was never afforded an opportunity to evaluate the merits of the WBE claim. Moreover, Adarand did not press this point during arguments before us.

More significantly, Adarand has made no showing that it has a personal stake in the WBE provisions. It offers no evidence whatsoever that it has been denied a federal subcontract because of a WBE, or that the gender preference of the SCC program prevents it from now bidding on an equal basis for federal subcontracts. For these reasons, we limit our review only to the constitutionality of the SCC program's racial preference. *See Northeastern Florida Chapter of the Associated Gen. Contractors of America v. City of Jacksonville*, 113 S. Ct. 2297, 2303 (1993).

III.

A.

We turn now to the merits of the appeal. Once again we are asked to determine the proper constitutional test for a race-conscious program implemented pursuant to a congressional command. As in *Ellis v. Skinner*, 961 F.2d 912 (10th Cir.), *cert. denied sub nom. Ellis v. Card*, 113 S. Ct. 374 (1992), resolution of this appeal turns on the question of whether the district court erred in applying the *Fullilove* standard, rather than the *Croson* test, to the facts of this case. Our decision in *Ellis* provides the answer: *Fullilove* controls.

In *Fullilove*, 448 U.S. 448 (1980), the Supreme Court approved the use of a 10% minority business enterprise (MBE) set-aside mandated by Congress. In rejecting a facial challenge to the constitutionality of the statute authorizing the MBE program, the Court found that Congress acts within its unique and broad powers under the Commerce Clause and section 5 of the Fourteenth Amendment when it imposes an affirmative action program to remedy nationwide discrimination in the construction industry. Under *Fullilove*, if Congress has expressly mandated a race-conscious program, a court must apply a lenient standard, resembling intermediate scrutiny, in assessing the program's constitutionality.[10]

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[10] The test of Chief Justice Burger's opinion for the Court is: (1) whether "the *objectives* of this legislation are within the power of Congress"; and (2) whether "the limited use of racial and ethnic criteria, in the context presented, is a constitutionally permissible *means* for achieving the congressional objectives and does not violate the equal protection component of the Due

In *Ellis*, we applied the *Fullilove* test in upholding the constitutionality of the DBE program, as applied by the Utah Department of Transportation as a prerequisite to the receipt of federal funds. 961 F.2d at 916. In *Ellis*, we were called upon to decide "whether Utah's failure to seek a waiver is equivalent to a local government enacting its own set-aside program, thus implementing the fact-finding requirements of *Croson*." *Id.* at 915. We held that it was not.

Although our analysis in *Ellis* focused on the waiver provisions of the DBE program established by STAA and renewed by STURAA, our opinion made clear that *Fullilove* provides the proper test for determining the constitutionality of a race-conscious measure authorized by Congress. Because the white contractor in *Ellis* stipulated that both STAA and STURAA and their implementing regulations were facially constitutional, we necessarily concluded that Utah was simply obeying a valid congressional command. Holding that Utah had complied with federal law, we stated that, under such circumstances, " '[W]e do not see how the state can be thought to have violated the Constitution.' " 961 *F.2d* at 916 (quoting *Milwaukee County Pavers Ass'n v. Fiedler*, 922 F.2d 419 (7th

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Process Clause of the Fifth Amendment." *Fullilove*, 448 U.S. at 473 (Opinion of Burger, C.J.). Three other members of the *Fullilove* Court believed that an intermediate scrutiny analysis should be used to determine whether a congressionally-mandated program passes constitutional muster under the Fifth and Fourteenth Amendments. *Id.* at 519 (Marshall, J., concurring in judgment). A majority of the *Fullilove* Court therefore agreed that strict scrutiny is not the proper test for evaluating a race-conscious remedial program authorized by an act of Congress.

Cir.), *cert. denied*, 111 S. Ct. 2261 (1992)); *accord Tennessee Asphalt Co. v. Farris*, 942 F.2d 969, 975 (6th Cir. 1991).

In the instant case, Adarand acknowledges that if the CFLHD is merely doing what Congress ordered it to do, the agency's action is constitutional unless the underlying legislation is unconstitutional. For purposes of this appeal, Adarand has stipulated that section 502 of the Small Business Act (15 U.S.C. § 644(g)) provides the statutory authority for the SCC program, and that section 502 satisfies the evidentiary requirements of *Fullilove*. Adarand also concedes that the CFLHD's utilization of the SCC program is not beyond the agency's delegated power under section 502. The gravamen of Adarand's argument is that the CFLHD must make particularized findings of past discrimination to justify its race-conscious SCC program under *Croson* because the precise goals of the challenged SCC program were fashioned and specified by an agency and not by Congress.

We disagree with Adarand's argument that *Croson* prevents the CFLHD from playing the role envisaged for it by the Small Business Act. The question of congressional action was not before the Court in *Croson*. In *Croson*, the Supreme Court held that a strict level of scrutiny must be applied to *state* or *local* public minority preference programs. Justice O'Connor's opinion, joined by Chief Justice Rehnquist and Justice White, explicitly distinguished *Fullilove* on the grounds that state and local governments have no constitutional mandate similar to or equal to Congress's specific constitutional mandate under section 5 to enforce the Fourteenth Amendment. Rather, section 1 of the Fourteenth Amendment took

power away from the states and gave it to Congress. 488 U.S. at 490 (Opinion of O'Connor, J.).

B.

Adarand cites no authority, nor do we know of any, to support the proposition that a federal agency must make independent findings to justify the use of a benign race-conscious program implemented in accordance with federal requirements.[11] In contrast to the situation in *Croson*, no state procurement or minority business policy is implicated by Adarand's claims. If particularized findings to justify implementation of a federal remedial program are not required of a state, *Ellis*, 961 F.2d at 916, they clearly are not required of a federal agency, such as CFLHD, which Adarand concedes is obligated to administer the remedial program.

The lesson that we glean from *Fullilove* and *Croson* is that the federal government, acting under congressional authority, can engage more freely in affirmative action than states and localities. *Ellis*, 961 F.2d at 915-16. The validity of that proposition was reaffirmed in *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, *reh'g denied*, 497

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[11] The principal circuit opinion upon which Adarand relies – *H.K. Porter Co. v. Metropolitan Dade County*, 975 F.2d 762 (11th Cir. 1992) – was recently vacated on the joint motion of the parties and remanded for dismissal of the action by the district court. 998 F.2d 892 (11th Cir. 1993). That case, in any event, was inapposite; it dealt with a *local* set-aside program and never addressed the issue of a *federal* agency's implementation of a statutory directive.

U.S. 1050 (1990), where the Court put to rest any lingering doubts about the continuing vitality of *Fullilove*:

> *Croson* cannot be read to undermine our decision in *Fullilove*. In fact, must of the language and reasoning in *Croson* reaffirmed the lesson of *Fullilove* that race-conscious classifications adopted by Congress to address racial and ethnic discrimination are subject to a different standard than such classifications prescribed by state and local governments."

Id. at 565. Indeed, the *Metro Broadcasting* majority held that even non-remedial race-conscious measures mandated by Congress are constitutionally permissible if they satisfy intermediate scrutiny.[12]

C.

By its enactment of section 502, Congress accorded broad discretion to agencies to implement the remedial goals of the Small Business Act. Although Congress did not dictate specific percentage goals for agencies to meet, the language of section 502 clearly contemplates that

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[12] *Metro Broadcasting* concerned two programs through which the Federal Communications Commission chooses the owner of a broadcast station partly on the basis of an applicant's race, ethnicity, or surname. In sustaining the program against an equal-protection attack, the Supreme Court first considered the stated aim of the government's program ("enhancing broadcast diversity") and held that this interest qualifies as a sufficiently important governmental goal. 110 S. Ct. at 3008-09. Because the program was substantially related to achievement of that objective, it satisfied equal protection requirements.

agencies will exceed the government-wide DBE participation goal of "*not less* than 5 percent." 15 U.S.C. § 644(g)(1) (emphasis added). The legislative history also evidences Congress's intention that each agency establish DBE goals above the 5% government-wide goal established by the President. H.R. Rep. No. 100-1070, 100th Cong., 2d Sess. 73 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5401, 5507. The SCC program is promulgated pursuant to this specific congressional delegation. In implementing the SCC program, CFLHD thus did exactly what Congress explicitly directed it to do: provide a means to ensure "*the maximum practicable opportunity*" for disadvantaged small business participation in federal procurement. 15 U.S.C. § 644(g) (emphasis added).

Adarand's argument that the racial preference of the SCC program is a discretionary agency action ignores the entity which created the presumption of minority disadvantage. The challenged SCC program derives its eligibility criteria from STAA and STURAA, which in turn incorporated the presumption of section 8(d) of the Small Business Act, 15 U.S.C. § 637(d)). Under section 8(d), a small "socially and economically disadvantaged" business is one that is at least 51% "owned by one or more socially and economically disadvantaged individuals," and "whose management and daily business operations are controlled by one or more of such individuals." *Id.* § 637(d)(3)(C). Section 8(d) presumes "that socially and economically disadvantaged individuals include Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities * * * ." *Id.* By incorporating that presumption into STAA and STURAA, Congress reaffirmed its mandate that federal

procurement opportunities be made more readily available to qualified minority-owned business enterprises. That rebuttable presumption also is found in the challenged SCC program. The SCC program thus provides subcontracting opportunities for the very type of small businesses that Congress had in mind when it enacted section 502 of the Small Business Act.

The conclusion that the CFLHD is acting within the bounds of the statutory authority of the Small Business Act is impelled by Adarand's own concession that the CFLHD's implementation of the SCC program was not beyond the agency's delegated power under section 502. Because the SCC program comports with the legislative design of the Small Business Act to increase subcontracting opportunities for minority-owned small businesses, it is reasonably related to the purposes of the enabling legislation. *Cf. Hecla Mining Co. v. United States*, 909 F.2d 1371, 1375-76 (10th Cir. 1990) ("[W]hen Congress explicitly or implicitly delegates to agencies the power to elucidate a specific provision of a statute, the resulting agency action is entitled to deference") (citing *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984)).

We also disagree with Adarand's argument that Congress must mandate precise percentage goals for minority small business participation. Such a position ignores the principal lesson of *Fullilove*. The splintered *Fullilove* court did not uphold the challenged federal program *because* a specific percentage set-aside was mandated by Congress, but rather because the program, *in spite* of the racial and

ethnic preference, satisfied equal protection requirements. 448 U.S. at 480 (Opinion of Burger, C.J.). In reaffirming *Fullilove* as the proper standard for assessing the constitutionality of benign race-conscious measures, the Court in *Metro Broadcasting* noted that, notwithstanding the " 'great weight' " given to decisions of Congress, even congressionally-mandated benign race-conscious measures must satisfy equal protection requirements. 110 S. Ct. at 3011 (citation omitted).

D.

Because Adarand stipulates that section 502 satisfies the evidentiary requirements of *Fullilove*, the only question to be resolved is whether the SCC program implemented by the CFLHD is narrowly tailored to achieve the remedial purpose of section 502. We hold that it is.

The program upheld in *Fullilove* was the model for the DBE program implemented by the DOT pursuant to STAA and STURAA, and utilized in the SCC program challenged by Adarand. Although the district court mistakenly treated the challenged program as being authorized STAA and STURAA, its analysis is equally applicable in assessing the constitutionality of the SCC program under the authority of section 502 of the Small Business Act.

The district court found that the challenged program satisfied *Fullilove* because it serves important governmental objectives and is substantially related to achievement of those objectives. 790 F. Supp. at 244. The district court concluded that the challenged program was narrowly tailored to achieve its statutory objectives because

it does not mandate its provisions in an inflexible manner. It ensures minimum impact on non-DBEs because

> [t]o qualify for DBE status a business must demonstrate, via the annual certification process, that it is a bona fide DBE, eligible to participate in the program. This annual certification mechanism is reasonably calculated to insure legitimate, qualified participants, so that the program does not become overinclusive in the sense of tolerating abuse of the program by non-DBE's. Likewise the program is not underinclusive since it provides that businesses not entitled to the presumption of DBE status may apply for certification and establish their qualifications to participate.

Id.

We hold that the SCC program is constitutional because it is narrowly tailored to achieve its significant governmental purpose of providing subcontracting opportunities for small disadvantaged business enterprises, as required under section 502 of the Small Business Act. The qualifying criteria of the SCC program is not limited to members of racial minority groups. Because eligibility is based on economic disadvantage, non-minority-owned businesses also are eligible to participate. The SCC program is not overinclusive since minority businesses that do not satisfy the economic criteria cannot qualify for DBE status. Furthermore, the SCC program is "appropriately limited in extent and duration" because federal procurement and construction contracting practices are subject to regular "resassessment and reevaluation by Congress." *See Fullilove*, 448 U.S. at 489 (Opinion of Burger, C.J.).

Significantly, the SCC program does not require small business prime contractors to submit and adhere to a subcontracting plan with specific DBE goals. The prime contractor in this case had the option, not the obligation, of subcontracting with a DBE; it exercised its own judgment (albeit attracted by CFLHD's monetary inducement) in rejecting Adarand's bid for the subcontract. Because the SCC program induces, rather than compels, prime contractors to hire DBE subcontractors, it cannot be said to violate equal protection requirements. As *Fullilove* teaches, "[i]t is not a constitutional defect in this program that it may disappoint the expectations of nonminority firms." 448 U.S. at 484.

IV.

Having rejected Adarand's arguments, and having held that the district court did not err in relying on *Fullilove* rather than *Croson*, that accordingly, no *Croson* findings were necessary, and that the Small Business Act which authorized the SCC program meets constitutional requirements, we will affirm the district court's order of April 21, 1992 in favor of the Government.

AFFIRMED.

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT
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February 16, 1994

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Re: 92-1242, Adarand Constructors v. Skinner
Lower docket: 90-C-1413

Dear Counsel:

Enclosed is a copy of the opinion of the court in the captioned case. Judgment in accordance with the opinion has been entered today.

Please call this office if you have questions.

Sincerely,

ROBERT L. HOECKER
Clerk

By: /s/ Beth Morris
Deputy Clerk

RLH:mbm

cc:
Honorable Jim R. Carrigan, District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

CASE NO. 90-C-1413

ADARAND CONSTRUCTORS, INC.,

Plaintiff,

v.

SAMUEL K. SKINNER, et al.,

Defendants.

MEMORANDUM OPINION AND ORDER

(Filed Apr. 21, 1992)

CARRIGAN, J.

Plaintiff Adarand Constructors, Inc. (Adarand), a Colorado corporation, commenced this action to challenge the constitutionality of the federal Disadvantaged Business Enterprise (DBE) program. Defendants are Samuel K. Skinner, Secretary of the Department of Transportation (DOT); Thomas D. Larson, Administrator of the Federal Highway Administration (FHA); Louis N. MacDonald, Administrator of Region VIII of the FHA; and Jerry Budwig, Division Engineer of the Central Federal Lands Highway Division (CFLHD). Presently pending is the plaintiff's motion for summary judgment seeking a permanent injunction against the DOT, the FHA and the CFLHD and a declaratory judgment ruling the federal DBE program unconstitutional both on its face and as applied. Also pending is the defendants' cross motion for

summary judgment seeking a ruling that the DBE program and its implementation are constitutional.

The parties have fully briefed the issues and oral argument would not materially facilitate the decision process. An *amicus curiae* brief has been filed by The Rocky Mountain Enterprise Legal Defense Fund. Jurisdiction exists under 28 U.S.C. § 1331 and § 1343.

I. Facts and Procedure.

On September 11, 1989, Adarand[1], a non-DBE guardrail subcontracting business submitted the lowest subcontract bid for a portion of guardrail work on the West Delores County, Colorado highway project. Plaintiff's bid was rejected and a DBE who had submitted a higher bid was awarded the subcontract.

This action was brought under 42 U.S.C. §§ 1983 and 2000(d) to challenge the constitutional validity of the DBE program promulgated under federal highway funding provisions of the Surface Transportation Assistance Act of 1982, Pub. L. No. 97-424 § 105(f), 96 Stat. 2097 (STAA) and the Surface Transportation and Uniform Relocation Assistance Act of 1987, Pub.L. No. 100-17 § 106(c), 101 Stat. 132 (STURAA). *See also* 49 C.F.R. §§ 23 *et seq.* Specifically, the plaintiff challenges the DBE program[2] as administered by the CFLHD within Colorado.

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[1] Adarand is managed by Randy Pech, a white male. Its stockholders include Valery J. Pech (Randy Pech's wife), Steven M. Goeglein, Ruth Pech and Linda Cosden.

[2] The challenged DBE program is not exclusively a race-conscious program. The program includes women owned businesses as well as other "disadvantaged" businesses. Thus, the plaintiff's contention that the DBE program awards contracts solely on the basis of race is incorrect.

II. Analysis.

STAA and STURAA create federal programs designed to benefit socially and economically disadvantaged business enterprises. Section 105(f) of STAA and § 106(c) of STURAA both provide in pertinent part: "[e]xcept to the extent that the Secretary determines otherwise, not less than 10 per centum of the amounts authorized to be appropriated under this Act shall be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals as defined by section 8(a) of the Small Business Act (15 U.S.C. § 637(a))." Pub.L. 97-424 § 105(f), Pub.L. 100-17 § 106(c).

The CFLHD, as a recipient of federal highway funds, participates in this program.[3] Discrimination based on race, color, national origin or sex in the award or performance of federal contracts under STAA and STURAA is prohibited, and participating agencies are directed to "take all necessary and reasonable steps . . . to ensure that minority business enterprises have the maximum opportunity to compete for and perform contracts." 49 C.F.R. §§ 23.7 and 23.43. States or federal agencies may award less than ten percent of such contracts to DBE's upon application to and approval by the Secretary of Transportation. 49 C.F.R. §§ 23.64(e), 23.65 and Part 23 Subpart D, Appendix D (1989).

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[3] The CFLHD includes all or parts of Arizona, California, Colorado, Hawaii, Kansas, Nebraska, Nevada, New Mexico, North Dakota, South Dakota, Texas, Utah and Wyoming.

Federal regulations promulgated in response to STAA and STURAA define DBE's as small businesses which are at least fifty-one percent owned and managed by disadvantaged individuals.[4] 49 C.F.R. § 23.62. These businesses qualify for DBE designation as well as preferential consideration in the award of subcontracts on federal highway projects. *Id.* Such businesses must be certified annually as "disadvantaged" and they maintain that status unless and until decertified by the participating state or agency. 49 C.F.R. § 23.51. Businesses not entitled to be presumed eligible for DBE status may apply and, upon sufficient showing, become certified by the Small Business Administration or the state as qualified for that status. Small Business Act § 8(a), 15 U.S.C. § 637(a).

Plaintiff's motion for summary judgment seeks a declaratory judgment and permanent injunction against the DOT, the FHA and the CFLHD until specific findings of discrimination are made by the defendants as allegedly required by *City of Richmond v. Croson*, 488 U.S. 469 (1989). Defendants' motion for summary judgment seeks a ruling that the DBE program and its implementation are constitutional under *Fullilove v. Klutznick*, 448 U.S. 448 (1980) and *Metro Broadcasting v. F.C.C.*, 110 S.Ct. 2997 (1990).

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[4] The category of disadvantaged individuals under 49 C.F.R. § 23.62 is rebuttably presumed to include "women, Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, [and] Asian-Indian Americans."

Summary judgment is proper if the pleadings, depositions and affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); Fed. R. Civ. P. 56. The party opposing a properly supported summary judgment motion may not rest upon the mere allegations of the complaint, but must set forth specific facts showing that there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986). Because no genuine issues of material fact are here disputed, this matter is ripe for decision on the pending cross motions for summary judgment.

In *Croson*, the Supreme Court held that, when instituting race-conscious measures, states and local government entities must make findings of prior discrimination. *Croson*, 488 U.S. at 490. Because no specific findings were made as to past discrimination, the City of Richmond's thirty percent minority set-aside program failed to satisfy strict scrutiny analysis and, therefore, was held unconstitutional.

Defendants distinguish *Croson* from the instant case noting that, unlike *Croson*, the defendants here are all federal actors. Defendants not that Justice O'Connor, in part of the *Croson* opinion in which she was joined by Chief Justice Rehnquist and Justice White, distinguished *Croson* from *Fullilove* by noting that "Congress may identify and redress the effects of society-wide discrimination [and] need not make specific findings of discrimination." *Id.* Defendants argue that *Fullilove* controls here.

In *Fullilove*, the Court, in upholding a federal funding program, stated that deference to the legislative authority of Congress under the Commerce Clause, the Spending Clause and the Civil War Amendments was appropriate. *Fullilove*, 448 U.S. at 475-478 (citations omitted). The Court specifically stated that:

> "[a] program that employs racial or ethnic criteria, even in a remedial context, calls for close examination; yet we are bound to approach our task with appropriate deference to the Congress, a co-equal branch charged by the Constitution with the power to 'provide for the general Welfare of the United States' and 'to enforce, by appropriate legislation' the equal protection guarantees of the Fourteenth Amendment". *Id.* at 472 (citations omitted).

Similarly, in the more recent decision of *Metro Broadcasting*, the Supreme Court upheld the constitutionality of a federal agency minority preference program stating that:

> "benign race-conscious measures mandated by Congress – even when those measures are not 'remedial' . . . are constitutionally permissible to the extent that they serve important government objectives within the power of Congress and are substantially related to the achievement of those objectives." *Metro Broadcasting*, 110 S.Ct. at 3000.

The Court found of "overriding significance" the fact that the minority program was "specifically approved – indeed, mandated – by Congress." *Id.* at 3008-09. *See also Michigan Road Builders Ass'n, Inc. v. Blanchard*, 761 F.Supp. 1303, 1314 (W.D.Mich. 1991) (upholding a state's application of the STAA and STURAA programs).

Croson is readily distinguishable from *Fullilove* and *Metro Broadcasting*. *Croson* did not address the issue of *congressional* action but decided what procedures state and local government entities must follow in evaluating minority public works programs. *Croson* specifically provided "[t]hat [because] Congress may identify and redress the effects of society wide discrimination does not mean that, *a fortiori*, the States and their political subdivisions are free to decide that such remedies are appropriate." *Croson*, 488 U.S. at 490.

It is clear under these cases that race-conscious classifications established by Congress are subject to a standard of review different from that applicable to similar classifications prescribed by state and local governments. The Supreme Court has declared:

> "*Croson* cannot be read to undermine [the] decision in *Fullilove*. In fact much of the language and reasoning in *Croson* reaffirmed the lesson of *Fullilove* that race-conscious classifications adopted by Congress are subject to a different standard than such classifications prescribed by state and local governments." *Metro Broadcasting*, 110 S.Ct. at 3009.

The overriding distinction between the program upheld in *Fullilove* and the instant program, when compared to the program held unconstitutional in *Croson*, is undoubtedly the congressional mandate behind the *Fullilove* program and this one. Further, the ruling and effect of *Fullilove* are clearly acknowledged in *Croson*. *Croson*, 488 U.S. at 491.

Thus *Fullilove*, *Croson* and *Metro Broadcasting* teach that "the federal government can, by virtue of the

enforcement clause of the Fourteenth Amendment, engage in affirmati··e action with a freer hand than states and municipalities." *Michigan Road Builders,* 761 F.Supp. at 1314 (*citing Milwaukee County Pavers Association v. Fiedler,* 922 F.2d 419, 423-24 (7th Cir. 1991)). Nothing in the above cases demands that the federal government assess incidents of past discrimination in all areas of the country where federal programs apply.

Rather these and other cases recognize that Congress is specifically empowered to remedy the effects of disabling discrimination, remove such barriers and "enforce, by appropriate legislation," the equal protection guarantees of the Fourteenth Amendment. *Fullilove,* 448 U.S. at 456-472, 476; *Croson,* 488 U.S. at 484-508. *See also Wygant v. Jackson Board of Education,* 476 U.S. 267, 277 (1985) (plurality opinion); *Michigan Road Builders,* 761 F.Supp. at 1313-14; *Ellis v. Skinner,* 753 F.Supp. 329 (D. Utah 1990).

The STAA, STURAA and DBE programs whose constitutionality is here attacked were authorized by Congress and mandated for all agencies and states which receive funds under them. Neither CFLHD nor its subparts in Colorado independently adopted the ten percent set-aside. Rather, it was required by the federal regulations under which CFLHD operates. Thus the mere fact that CFLHD implements a federal program within Colorado does not convert it into a state program requiring *Croson*-type analysis. Accordingly, *Croson* is not controlling here because the challenged regulations and actions involve only federal actors acting pursuant to congressional mandate. Rather *Fullilove* and *Metro Broadcasting* control.

In determining the constitutionality of the challenged DBE program, it must be demonstrated that the program serves important governmental objectives and that it is substantially related to achievement of these objectives.[5] *See Fullilove,* 488 U.S. at 473-475 and 480-492. Although Congress made no specific findings on the subject, the Court in *Fullilove* was satisfied, as I am here, that Congress had "abundant historical basis from which it could conclude" such findings sufficient to demonstrate important governmental objectives underlying the program. *Id.* at 478.

Because I am satisfied that the instant program serves appropriate governmental objectives, the question becomes whether it is narrowly tailored to achieve the objectives of STAA and STURAA without violating constitutional guarantees. The DBE program must be analyzed to assure that it does not mandate its provisions in an inflexible manner and that it successfully ensures minimum impact on non-DBEs. *See Id.* at 480; *Metro Broadcasting,* 110 S.Ct. at 3027-28.

To qualify for DBE status a business must demonstrate, via the annual certification process, that it is a bona fide DBE, eligible to participate in the program. 49 C.F.R. § 23.62 and Part 23, Subpart D, Appendix C. This annual certification mechanism is reasonably calculated

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[5] The Supreme Court in *Fullilove* noted that "[section] 5 [of the Fourteenth Amendment] is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment." *Fullilove,* 448 U.S. at 476.

to insure legitimate, qualified participants, so that the program does not become overinclusive in the sense of tolerating abuse of the program by non-DBE's. Likewise the program is not underinclusive since it provides that businesses not entitled to the presumption of DBE status may apply for certification and establish their qualifications to participate. *Id.* Finally, waiver of the mandatory ten percent minimum is provided through a state or agency's application to and approval by the Secretary of Transportation. 49 C.F.R. §§ 23.64(e), 23.65 and Part 23, Subpart D, Appendix D.

Plaintiff correctly points out that the CFLHD is required to comply fully with the Fifth and Fourteenth Amendments to the constitution. However, the plaintiff's assertion that CFLHD has failed to comply with applicable regulations is not supported by evidence.

It is significant that the instant legislation and resulting programs were modeled after the programs upheld in *Fullilove*. I conclude that the DOT, FHA and CFLHD's policies do not violate equal protection since they are supported by longstanding congressional policies related to achieving the important governmental objective of remedying discrimination. Additionally, the challenged programs are narrowly tailored to achieve their legitimate objectives. I therefore conclude that the administrative program under which the defendants have acted meets the requirements of the Fifth and Fourteenth Amendments.

Accordingly, it is ORDERED that:

(1) the defendants' motion for summary judgment is granted;

(2) the plaintiff's motion for summary judgment is denied; and

(3) the plaintiff's claims and action are dismissed with prejudice.

Dated at Denver, Colorado April 21, 1992.

BY THE COURT:

/s/ Jim R. Carrigan
JIM R. CARRIGAN
UNITED STATES DISTRICT JUDGE

ENTERED
ON THE DOCKET

APR 22 1992

JAMES R. MANGBEAKER
BY JM CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
JUDGE JIM R. CARRIGAN

CERTIFICATE OF MAILING

I certify that I mailed a true and correct copy of the Order signed by Judge Carrigan to:

William Pendley, Esq.
1660 Lincoln st. #2300
Denver, CO 80264

Stephen Taylor, Esq.
Assistant U.S. Attorney

John Dunne, Esq.
Assistant Attorney General
U.S. Department of Justice
P.O. Box 65968
Washington, DC 20035-5968

Magistrate Abram

/s/ Lucy Stis
Deputy Clerk

Dated: April 21, 1992

Re: 90-C-1413

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15 USC § 644(g)

(g) Goals for participation of small business concerns in procurement contracts. (1) The President shall annually establish Government-wide goals for procurement contacts awarded to small business concerns and small business concerns owned and controlled by socially and economically disadvantaged individuals. The Government-wide goal for participation by small business concerns shall be established at not less than 20 percent of the total value of all prime contract awards for each fiscal year. The Government-wide goal for participation by small business concerns owned and controlled by socially and economically disadvantaged individuals shall be established at not less than 5 percent of the total value of all prime contract and subcontract awards for each fiscal year. Notwithstanding the Government-wide goal, each agency shall have an annual goal that presents, for that agency, the maximum practicable opportunity for small business concerns and small business concerns owned and controlled by socially and economically disadvantaged individuals to participate in the performance of contracts let by such agency. The Administration and the Administrator of the Office of Federal Procurement Policy shall, when exercising their authority pursuant to paragraph (2), insure that the cumulative annual prime contract goals for all agencies meet or exceed the annual Government-wide prime contract goal established by the President pursuant to this paragraph.

(2) The head of each Federal agency shall, after consultation with the Administration, establish goals for the participation by small business concerns, and by small business concerns owned and controlled by socially and

economically disadvantaged individuals, in procurement contracts of such agency. Goals established under this subsection shall be jointly established by the Administration and the head of each Federal agency and shall realistically reflect the potential of small business concerns and small business concerns owned and controlled by socially and economically disadvantaged individuals to perform such contracts and to perform subcontracts under such contracts. Whenever the Administration and the head of any Federal agency fail to agree on established goals, the disagreement shall be submitted to the Administrator of the Office of Federal Procurement Policy for final determination. For the purpose of establishing goals under this subsection the head of each Federal agency shall make consistent efforts to annually expand participation by small business concerns from each industry category in procurement contracts of the agency, including participation by small business concerns owned and controlled by socially and economically disadvantaged individuals. The head of each Federal agency, in attempting to attain such participation, shall consider –

(A) contracts awarded as the result of unrestricted competition; and

(B) contracts awarded after competition restricted to eligible small business concerns under this section and under the program established under section 8(a) [15 USCS § 637(a)].

No. 92-1242

In the UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ADARAND CONSTRUCTORS, INC.,

Plaintiff-Appellant,

v.

FEDERICO PENA, Secretary of Department of Transportation, *et al.*,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

APPELLANT'S REPLY BRIEF

RECEIVED
United States Court of Appeals
Tenth Circuit
Feb. 17, 1993

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* * *

work. *Wygant v. Jackson Bd. of Education*, 476 U.S. 267, 275 (1986) (plurality opinion). Instead, its only possible function is simply to increase the amount of business going to minority-owned firms. This is "discrimination for its own sake", which is the very essence of a constitutional violation. *Regents of the Univ. of California v. Bakke*, 438 U.S. 267, 305 (1978) (opinion of Powell, J.).

The factor which determines the level of preference under the SBA is the capacity of minority-owned firms to do work. This factor has no connection whatsoever to the level of discrimination identified, or to the appropriate remedy therefore [sic]. Indeed, this structure actually inverts the normal operation of a remedial program. Under a true remedial program, the level of preference accorded to the favored group should bear a relationship to the amount of discrimination members of the group have suffered. However, under the "maximum practicable" rule, as the level of pre-existing discrimination (and hence of the need for a remedy) decreases, the level of the goals for minority participation will actually increase.

Federal Defendants assert that the SBA is, in fact, remedial because Congressional files contained some evidence of discrimination against minorities when Congress enacted the goals provision. Brief for the Federal Appellees at 35. Adarand concedes, for the sake of discussion, that this evidence is sufficient to satisfy the evidentiary requirements of *Fullilove*.[6] However, this concession is not enough to save Federal Defendants' argument. The reason is that Federal Defendants still must show that the provision is sufficiently well tailored to satisfy the requirements of *Fullilove*. This they cannot do.

In sum, the plain language of the SBA goals provision convincingly shows that it is not remedial in nature or intent. Adarand has already shown that the inclusion of the "maximum practicable" language in the SBA goals provision renders the provision unconstitutional under both strict and intermediate scrutiny. *See* Appellant's Opening Brief at 36-38 (strict scrutiny); Appellant's Opening Brief at 41 (intermediate scrutiny). The same conclusion applies even if *Fullilove* is chosen as the proper standard of review.

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[6] Much of this evidence is not part of the legislative history. *See* Brief for the Federal Appellees at 32-35. Consideration of this evidence is permissible under *Fullilove*. *Fullilove*, 448 U.S. 448, 502-503 (opinion of Powell, J.). However, strictly speaking, it is not proper in this case, because this evidence was not introduced in the district court and is not part of the administrative record. *See* Fed. R. App. P. 10(a).

CONCLUSION

Based upon the foregoing reasoning and authorities, Appellant Adarand Constructors, Inc. respectfully requests this Court to reverse the decision of the District Court and grant judgment for Adarand in this case.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 90-C-1413

ADARAND CONSTRUCTORS,

Plaintiff,

vs.

SAMUEL K. SKINNER, Secretary of the Department of Transportation; ROBERT E. FARRIS, Administrator of the Federal Highway Administration; LOUIS N. MacDONALD, Administrator of Region VIII of the Federal Highway Administration; and JERRY BUDWIG, Division Engineer of the Central Federal Lands Highway Division,

Defendants.

DEPOSITION OF JERRY BUDWIG
MARCH 19, 1991

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* * *

[p. 23] A. No. No, I'm not capable.

Q. Do you know how many DBE contractors there are in the state of Colorado?

A. No.

Q. Do you know how many 8(a) DBE contractors there are in Colorado?

A. No.

Q. Do you know whether or not there has ever been any discrimination by the Central Division or its predecessors in the highway construction industry in the state of Colorado?

A. I would say that there has not been.

Q. Has your boss or anyone above him ever asked you to make a study or report about any alleged discrimination in the highway construction industry in this division?

A. No.

Q. Do you know what percentage of the highway contracts are generally subcontracted?

A. I know it's not supposed to exceed 50 percent under the terms of our contracts.

Q. But you don't – you don't – okay. Mr. Robinson testified that if – that meeting certain requirements, which I'm not going to go through with you, because I don't think it's relevant

* * *

[p. 35] Q. In discussing the effects – evaluating the effects of the subcontracting compensation clause, do you know who that clause burdens in terms of the construction industry?

A. No.

Q. Do you know who it benefits?

A. I would think that it would benefit the recipients of the work under the provisions of the clause and probably benefits the prime contractors who avail themselves of the bonus provisions of that clause.

Q. So it would – if I understand you correctly, it would benefit the prime contractor who availed himself

of that provision and the DBE who received the subcontract as a result of that; is that correct?

A. I certainly wouldn't expect it in every instance that's the way it would work out, but I think overall it works out that way.

Q. And it would probably burden the subcontractors who are not DBEs who do that same kind of work?

A. That's a line of reasoning I won't argue with. There is some logic there.

Q. Do you know how long the subcontracting [p. 36] compensation clause will be used?

A. I'm not aware that its end is in sight.

Q. Have there been any discussions about a need to end the use of that provision?

A. Not that I've been a part of it.

Q. Okay. Has anyone ever reported to you, and I'm talking about a person that reports to you that they've been discriminated against in the highway industry?

A. No.

Q. Are special skills required in the construction industry?

A. Yes.

Q. Have you attempted to use any programs in – to include DBEs in construction contracts or – well, in construction contracts that are not race based?

A. I think the answer is no, unless you want to – again, want to do the woman-owned businesses, that's not race based, not necessarily anyway.

Q. Other than women.

A. Other than women I think the answer to that would be no.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 90-C-1413

ADARAND CONSTRUCTORS,

Plaintiff,

vs.

SAMUEL K. SKINNER, Secretary of the Department of Transportation; ROBERT E. FARRIS, Administrator of the Federal Highway Administration; LOUIS N. MacDONALD, Administrator of Region VIII of the Federal Highway Administration; and JERRY BUDWIG, Division Engineer of the Central Federal Lands Highway Division,

Defendants.

DEPOSITION OF JAMES L. ROBINSON
MARCH 19, 1991

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* * *

[p. 45] development of the West Dolores project contract documents?

A. Yes, I was.

Q. Is that correct?

A. Yes.

Q. What was the goal at that time?

A. I would have to look in the files to get the exact number, but I would say the total goal was in the range of 12 to 15 percent.

Q. What does the 12 to 15 percent represent?

A. Dollars of our program. Typically our contract awards will be about $40 million per year, so the goal for the DBE then is in the range of four or five million through those three means of counting the numbers.

Q. What happens if you don't meet that goal?

A. Mr. Budwig receives a chat from the supervisor.

Q. Does it change from year to year?

A. In recent years it hasn't changed greatly.

Q. Do you know if that goal is different for this division than it is for the other two

* * *

No. 93-1841

(2)

Supreme Court, U.S.
FILED
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In the Supreme Court of the United States

OCTOBER TERM, 1994

ADARAND CONSTRUCTORS, INC., PETITIONER

v.

FEDERICO PENA,
SECRETARY OF TRANSPORTATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the equal protection component of the Fifth Amendment prohibits Congress from enacting a rebuttable presumption that minority-owned and controlled businesses are disadvantaged business enterprises under the Small Business Act.

2. Whether the equal protection component of the Fifth Amendment prohibits the Department of Transportation, pursuant to the Small Business Act, from offering added compensation to federal government prime contractors who subcontract ten percent or more of their contract work to disadvantaged business enterprises in order to cover the costs of assisting the disadvantaged businesses.

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In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 93-1841

ADARAND CONSTRUCTORS, INC., PETITIONER

v.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-24) is reported at 16 F.3d 1537. The opinion and order of the district court (Pet. App. 27-37) are reported at 790 F. Supp. 240.

JURISDICTION

The judgment of the court of appeals was entered on February 16, 1994. The petition for a writ of certiorari was filed on May 17, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress, through the Small Business Act, requires the Executive Branch to use its purchasing power to foster the development of small businesses, including small businesses owned and controlled by socially and economically disadvantaged persons. See generally 15 U.S.C. 631 (Declaration of policy). The Act requires annual, government-wide goals to be set for purchases of supplies and services from small business enterprises and small disadvantaged business enterprises (DBEs), and sets a 20% floor for the small business procurement goal, and a 5% floor for the DBE procurement goal. 15 U.S.C. 644(g)(1). The Act requires the President to adjust the government-wide goals annually, and requires each executive agency to develop subsidiary goals appropriate to its own contracting needs and the markets from which it procures goods and services.[1] The DBE goals may be waived where not

[1] These obligations were first codified in 1978 as an amendment to the Small Business Act, which provided that "[t]he head of each Federal agency shall, after consultation with the [Small Business] Administration, establish goals for the participation by small business concerns, and by small business concerns owned and controlled by socially and economically disadvantaged individuals, in procurement contracts of such agency." Act of Oct. 24, 1978, Pub. L. No. 95-507, § 221(g), 92 Stat. 1770, currently codified at 15 U.S.C. 644(g)(2) (1988 & Supp. IV 1992). In 1988, Congress added a requirement of annual, government-wide goals of at least 20% for small businesses and 5% for disadvantaged businesses, and simultaneously obligated agencies to continue to adopt their own goals, compatible with the government-wide goals, in an effort to create "maximum practicable opportunity" for small and disadvantaged businesses to sell their goods and services to the government. Business Opportunity Development Reform Act of 1988, Pub. L. No. 100-656, § 502, 102 Stat. 3887, codified at 15 U.S.C. 644(g)(1).

practicable.[2] The statutory definition of DBE includes a racial component, but it is not exclusively race-based.[3] It encompasses businesses owned and controlled by members of racial minorities, but it also includes persons who have been subjected to "ethnic prejudice or cultural bias." Moreover, where a person is "not truly

[2] See 15 U.S.C. 644(h)(1) (requiring justification for failure to meet goals); 49 C.F.R. 23.64(e), 23.65 (setting forth waiver criteria for Department of Transportation).

[3] The Small Business Act defines a "small-business concern" as one that is independently owned and operated, is not dominant in its field of operation, and has annual receipts not in excess of $500,000. 15 U.S.C. 632(a)(1). The Act defines "small business concern owned and controlled by socially and economically disadvantaged individuals" as a small business that is at least 51% owned and controlled by persons who are socially and economically disadvantaged. 15 U.S.C. 637(d)(3)(C) (1988 & Supp. IV 1992). "Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, and other minorities" are presumed to be disadvantaged. 15 U.S.C. 637(d)(3)(C); 48 C.F.R. 52.219-8. "[A]ny other individual found to be disadvantaged by the Administration pursuant to section 8(a) of the Small Business Act" is also, however, presumptively disadvantaged. *Ibid.* Section 8(a) of the Act, 15 U.S.C. 637(a), defines social and economic disadvantage in race-neutral terms. "Socially disadvantaged" persons are those who have been subjected to "racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities." 15 U.S.C. 637(a)(5). "Economically disadvantaged individuals" are socially disadvantaged persons who also demonstrate that their "ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged." 15 U.S.C. 637(a)(6)(A). See also 49 C.F.R., Pt. 23, Subpt. D, App. C (Guidance for Making Determinations of Social and Economic Disadvantage).

socially and/or economically disadvantaged," his or her business may be excluded from coverage. See 49 C.F.R. Pt. 23, Subpt. D, App. C.

Agency goals established under the Small Business Act and the progress made toward their attainment are subject to ongoing congressional oversight. At the end of each fiscal year, federal agencies must report to the Small Business Administration on the extent of participation by small businesses and disadvantaged businesses in federal procurement. 15 U.S.C. 644(h). Those reports are compiled by the Small Business Administration, and submitted to the President and Congress. Oversight of DBE programs forms a substantial part of the work of two congressional committees, the Senate Committee on Small Business and the Committee on Small Business of the House of Representatives. The Urban and Minority-Owned Business Development Subcommittee of the Senate Small Business Committee and the Minority Enterprise, Finance and Urban Development Subcommittee of the House Small Business Committee conduct periodic hearings on the compliance of each agency and agency subdivision with the Small Business Act's DBE provisions. Those agencies not subjected to a full hearing in a given year nonetheless have their goals and compliance therewith monitored by the subcommittees annually.

The Central Federal Lands Highway Division (CFLHD) of the United States Department of Transportation (DOT)[4] uses a variety of methods to increase its contracting with DBEs to help meet DOT's goals

[4] The CFLHD is one of three regional divisions within the Federal Lands Highway Program, a component of the Federal Highway Administration.

under the Small Business Act.[5] One method CFLHD uses is to provide added compensation of up to 1.5% of a total contract amount to any prime contractor who subcontracts ten percent or more of the work required under the prime contract to a disadvantaged business enterprise. Pet. App. 7. The compensation program is explained in a Subcontracting Compensation Clause (SCC) included in the standard specifications for construction of roads and bridges on federal highway projects. Def. Br. in Support of Mot. for Summary Judgment Exh. 1, at I-24. The 1.5% compensation is designed to reimburse prime contractors for the additional expenses they incur in working with a DBE subcontractor. Pet. App. 10. The program does not establish a set-aside, but leaves to the discretion of each prime contractor whether to seek disadvantaged subcontractors and to obtain the compensation offered. Pet. App. 12 n. 9.

Prime contractors' eligibility for the 1.5% compensation under the SCC is based on the disadvantaged status of the prime contractors' subcontractors. Disadvantaged businesses may, but need not, be minority-

[5] The Small Business Act contemplates that agencies will use a range of means to achieve their annual disadvantaged-business procurement goals, including "noncompetitive negotiation" targeted to DBEs and "competition restricted to small business concerns owned and controlled by socially and economically disadvantaged individuals." See 15 U.S.C. 644(h)(2)(D). The CFLHD has used three methods to contract with small businesses and DBEs: (1) competitive bidding without affirmative action; (2) contracts with the Small Business Administration, which in turn subcontracts with DBEs, as provided by Section 8(a), 15 U.S.C. 637(a), see generally 48 C.F.R. Ch.1, Subch. D, Pt. 19, Subpt. 19.8; and (3) encouragement of DBE subcontracting by prime contractors.

owned and controlled businesses. The only race-based criterion bearing on the applicability of the SCC is the Small Business Act's rebuttable presumption that small businesses owned and controlled by members of racial minority groups are disadvantaged.[6] A presumption of disadvantage, including a presumption based on race, may be rebutted if it is shown, based on information provided from any source, that "the firm's owners are not truly socially and/or economically disadvantaged." 49 C.F.R. Pt. 23, Subpt. D, App. C; see also 15 U.S.C. 637(a)(6)(C).

2. Petitioner is a highway construction company. Pet. 4; Pet. App. 3. Petitioner does not meet any of the statutory or regulatory definitions of a small disadvantaged business enterprise. Pet. App. 11. As of September, 1989, CFLHD had conducted a process of competitive sealed bidding for a federally funded highway construction project in the San Juan National Forest known as the West Dolores Project.[7] The prime contract

[6] The SCC expressly refers for its definition of DBE to the relevant Federal Acquisition Regulations System provisions, 48 C.F.R. 52.219-8 and 52.219-13. These regulations implement the acquisition-related sections of the Small Business Act, 15 U.S.C. 631 *et seq.* The Small Business Act itself establishes a presumption of disadvantage on the part of members of certain racial minority groups, as well as other persons already found to be socially and economically disadvantaged pursuant to section 8(a) of the Act, 15 U.S.C. 637(a). 15 U.S.C. 637(d)(3)(C) (1988 & Supp. IV 1992). See note 3, *supra*.

[7] The funding for the West Dolores project was provided by the Highway Trust Fund as special forest highway project funding under Section 106(a)(8) of the Surface Transportation and Uniform Relocation Assistance Act of 1987 (STURAA), Pub. L. No. 100-17, 101 Stat. 145. Although the bulk of funds authorized out of the Highway Trust Fund under STURAA were granted through states and localities, Section 106(a)(8) of STURAA also provided $55 million annually between 1987 and 1991 for federally administered forest highway projects. The funds for the West Dolores project were thus not channeled through any state or locality, but allocated directly to the CFLHD.

was awarded to the lowest bidder, Mountain Gravel and Construction Company. Mountain Gravel decided to subcontract the guardrail portion of the project to another company. Petitioner bid for the subcontract, but on September 15, 1989, Mountain Gravel elected to subcontract with Gonzales Construction Co., a small business enterprise certified as disadvantaged, even though Gonzales had submitted a higher bid than had petitioner. Because the guardrail project constituted more than ten percent of the dollar amount of the contract, Mountain Gravel accordingly became entitled to the 1.5% bonus under the SCC. Petitioner challenged CFLHD's application of its subcontracting policy to Mountain Gravel as a race-based set-aside, which it contends is unconstitutional under *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469 (1989). Pet. App. 10-11.

3. On August 10, 1990, petitioner filed suit for declaratory and injunctive relief against officials of DOT, alleging that the use of the SCC violates 42 U.S.C. 1983, 42 U.S.C. 2000d *et seq.* (Tit. VI), and the Fifth and Fourteenth Amendments to the United States Constitution. Pet. App. 11. On April 24, 1991, the parties filed cross-motions for summary judgment. *Ibid.* On April 21, 1992, the district court granted defendants' motion for summary judgment, and denied petitioner's motion for summary judgment. Pet App. 27-37.

The district court rejected petitioner's argument that the challenged federal program must be given strict judicial scrutiny under *City of Richmond* v. *J.A. Croson*, holding instead that *Fullilove* v. *Klutznick*, 448 U.S. 448

(1980), and *Metro Broadcasting, Inc.* v. *FCC*, 497 U.S. 547 (1990), establish the relevant standard:

> It is clear under these cases that race-conscious classifications established by Congress are subject to a standard of review different from that applicable to similar classifications prescribed by state and local governments.

Pet. App. 33. The court stated that "the congressional mandate behind the *Fullilove* program and this one" distinguish them from the program invalidated in *Croson*. *Ibid.*

The district court determined that nothing in the governing cases "demands that the federal government assess incidents of past discrimination in all areas of the country where federal programs apply." Pet. App. 34. Section 5 of the Fourteenth Amendment empowers Congress to enact legislation "to remedy the effects of disabling discrimination" on a national basis, and Congress exercised that power in establishing the challenged program. *Ibid.* The court was satisfied that here, as in *Fullilove*, Congress had an "abundant historical basis" to support the challenged program. *Id.* at 35. "[T]he mere fact that CFLHD implements a federal program within Colorado does not convert it into a state program requiring *Croson*-type analysis," and thus the absence of particularized findings of discrimination in Colorado did not render the program unconstitutional. *Id.* at 34.

The district court also held that the SCC is narrowly tailored. Pet. App. 35-36. The court found that the SCC is not "overinclusive" because the annual DBE certification process ensures that only legitimate qualified DBEs participate in the program. *Ibid.* It is also not "underinclusive" because firms not presumptively included as disadvantaged may apply for certification as DBEs and become qualified to participate. Pet. App. 36. The court noted that the waiver mechanism properly relieves federal agencies of their DBE obligations when there are not enough qualified DBEs available to achieve the agency's goal. *Ibid.*

4. The court of appeals affirmed. Pet. App. 1-24. The court held that *Fullilove*, not *Croson*, controls. Pet. App. 15. "Under *Fullilove*, if Congress has expressly mandated a race-conscious program, a court must apply a lenient standard, resembling intermediate scrutiny, in assessing the program's constitutionality." *Ibid.* "Indeed," the court observed, "the *Metro Broadcasting* majority held that even non-remedial race-conscious measures mandated by Congress are constitutionally permissible if they satisfy intermediate scrutiny." *Id.* at 19.

The court rejected petitioner's argument that, because the challenged SCC program was "fashioned and specified by an agency and not by Congress," Pet. App. 17, particularized findings of past discrimination were therefore required to justify the program under *Croson*. The court stated that "[petitioner] cites no authority, nor do we know of any, to support the proposition that a federal agency must make independent findings to justify the use of a benign race-conscious program implemented in accordance with federal requirements." *Id.* at 18.

The court of appeals found that the particular aspects of the SCC program petitioner challenges—the 10% DBE threshold and the rebuttable presumption of DBE status for minority businesses—were authorized by Congress. The court found that Congress, through Section 502 of the Small Business Act, 15 U.S.C. 644(g), authorized the agencies to exercise their own discretion

to establish goals above the 5% government-wide goal for disadvantaged small business participation in federal procurement. Pet. App. 19-20. Section 502 expressly requires that agencies establish annual goals designed to ensure the "maximum practicable opportunity" for small businesses and disadvantaged small businesses to participate in federal procurement. *Id.* at 20, quoting 15 U.S.C. 644(g)(1). The court concluded that, in implementing the Subcontracting Compensation Clause program by including SCCs in contracts with small-business prime contractors, CFLHD "did exactly what Congress explicitly directed it to do" under Section 502. Pet. App. 20. The court also emphasized that it was Congress and not the agency which established the rebuttable presumption employed in the challenged SCC program that businesses owned by members of certain racial minorities are socially and economically disadvantaged. *Id.* at 20-21.

Finally, the court of appeals ruled that the SCC is constitutional under *Fullilove* because it is narrowly tailored to achieve the significant governmental objective of providing subcontracting opportunities for DBEs. The court observed that the "qualifying criteria of the SCC program [are] not limited to members of racial minority groups," and that "minority businesses that do not satisfy the economic criteria cannot qualify for DBE status." Pet. App. 23. The court also pointed out that the 10% threshold of CFLHD's SCC "is an optional goal, not a set-aside," because "it is entirely at the discretion of the prime contractor whether to exercise its option under the Subcontracting Compensation Clause, or to ignore it and forego the monetary reward CFLHD offers for hiring DBEs as subcontractors." *Id.* at 12 n.9. Consistent with *Fullilove*, the SCC was, in the court's view, "'appropriately limited in * * * duration' because

federal procurement and construction contracting practices, are subject to regular 'reassessment and reevaluation by Congress.'" Pet. App. 23.[8]

ARGUMENT

Petitioner challenges the application of the Subcontracting Compensation Clause in this case as if it were a minority set-aside requirement. See Pet. 24 (referring to a "race-based quota"); Pet. 22 (referring to "a race-based[] set-aside program"). Although the Small Business Act employs race as a factor, its goals are not based on race, but on disadvantage. The reason Gonzales Construction Company, and not petitioner, received the subcontract was that Gonzales falls within the statutory definition of a small disadvantaged business enterprise, and CFLHD offered compensation to encourage Mountain Gravel to work with such disadvantaged businesses. Petitioner does not contend that it is a small disadvantaged business. Indeed, if it were a DBE similarly situated to Gonzales in every way but the race of the persons who own and operate it and had made a lower bid than Gonzales, petitioner would, no doubt, have been awarded the subcontract.

The only race-based criterion that entered even indirectly into Mountain Gravel's subcontracting decision was the statutory presumption that Gonzales, a

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[8] Petitioner's complaint erroneously alleged that the SCC relied for statutory authorization on STURAA, n.7, *supra*, and STAA, the Surface Transportation Assistance Act of 1982, Pub. L. No. 97-424, § 105(f), 96 Stat. 2100. Pet. App. 4. The district court thus mistakenly analyzed the challenged program under STAA and STURAA. The court of appeals, however, recognized that the DBE program was developed to satisfy the DOT's obligations under Section 502 of the Small Business Act, 15 U.S.C. 644(g), and upheld it pursuant to that authority.

minority-owned and controlled business, was a DBE. Petitioner has not challenged the status of Gonzales as a bona fide DBE by seeking to rebut the presumption. See Pet. 5 (referring to Gonzales as "a certified DBE"). There is no question on the record in this case that Gonzales was in fact disadvantaged, and petitioner was not. The relevant question here is thus whether CFLHD was authorized, in granting compensation under the SCC, to rely on Congress's definition of disadvantaged business enterprise, which includes a rebuttable race-based component. 15 U.S.C. 637(d)(3)(C) (1988 & Supp. IV 1992); 49 C.F.R. Pt. 23, Subpt. D, App. C.

1. In petitioner's view, *Fullilove* v. *Klutznick*, 448 U.S. 448 (1980), and *Metro Broadcasting* v. *FCC*, 497 U.S. 547 (1990), require the same level of constitutional scrutiny of the federal DBE program at issue here as *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469 (1989), required of a municipal program. Pet. 7-13, 20-22. This is not the case.

Fullilove upheld a 10% minority business enterprise (MBE) program enacted by Congress in Section 103(f)(2) of the Public Works Employment Act of 1977 (PWEA), Pub. L. No. 95-28, 91 Stat. 116, on the grounds that (1) the objective of the legislation to spend federal funds to remedy past discrimination in public contracting was within Congress's power, 448 U.S. at 472-480, and (2) the flexible use of racial and ethnic criteria as a means to accomplish that objective was constitutionally valid. *Id.* at 480-492. *Fullilove* did not employ strict scrutiny,[9] nor is such scrutiny appropriate here.

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[9] See *Metro Broadcasting*, 497 U.S. at 564 (stating that "[a] majority of the Court in *Fullilove* did not apply strict scrutiny"). Petitioner's characterization of the *Metro Broadcasting* majority opinion as supported by "[o]nly four Justices," Pet. 12, is incorrect. Although Justice Stevens wrote a brief concurring opinion, *id.* at 601, he joined the majority opinion in full. *Id.* at 602.

The applicability of the *Fullilove* standard to race-conscious measures adopted by Congress was underscored by *City of Richmond* v. *J.A. Croson Co.*, in which this Court acknowledged that Congress has powers that states and localities lack to adopt race-based remedial measures. 488 U.S. at 486-490 (Opinion of O'Connor, J., joined by Rehnquist, C.J. and White, J.); see *id.* at 557-561 (Marshall, J., dissenting, joined by Brennan and Blackmun, JJ.) (describing broad congressional power); see also *Tennessee Asphalt* v. *Farris*, 942 F.2d 969, 972 (6th Cir. 1991), quoting *Milwaukee County Paver's Ass'n* v. *Fiedler*, 922 F.2d 419, 423-424 (7th Cir.), cert. denied, 500 U.S. 954 (1991) (describing "[t]he joint lesson of *Fullilove* and *Croson*" that "the federal government can, by virtue of the enforcement clause of the Fourteenth Amendment, engage in affirmative action with a freer hand than states and municipalities"). In determining that the City of Richmond's 30% race-based set-aside had an insufficient factual predicate of past discrimination and was insufficiently narrowly tailored to survive Equal Protection review, Justice O'Connor distinguished *Fullilove* on the ground that "Congress, unlike any State or political subdivision, has a specific constitutional mandate to enforce the dictates of the Fourteenth Amendment." 488 U.S. at 490.

In *Metro Broadcasting, Inc.* v. *FCC*, 497 U.S. 547 (1990), this Court again reaffirmed *Fullilove*, holding that intermediate rather than strict scrutiny applies to congressionally authorized race-conscious affirmative action programs:

> *Croson* cannot be read to undermine our decision in *Fullilove*. In fact, much of the language and reasoning in *Croson* reaffirmed the lesson of *Fullilove* that race-conscious classifications adopted by Congress to address racial and ethnic discrimination are subject to a different standard than such classifications prescribed by state and local governments.

497 U.S. at 565. The Court upheld the FCC's policies of weighing minority ownership as a favorable factor among other relevant factors when considering applications for new radio or television broadcast stations and transferring stations to minority owners in non-competitive "distress sales." The Court used an intermediate standard of review, requiring that the policies be "substantially related" to the achievement of the "important governmental objective" of broadcast diversity. *Id.* at 566. Notwithstanding that the specific details of the affirmative action program upheld in *Metro Broadcasting* were set by the FCC, and not by Congress itself, the Court held that "when a program employing a benign racial classification is adopted by an administrative agency at the explicit direction of Congress, we are 'bound to approach our task with appropriate deference to the Congress.'" *Id.* at 563.

2. The same remedial purpose accepted by the Court as sufficient to support the program challenged in *Fullilove* provides even stronger support for the DBE provisions of the Small Business Act. Referring to the evidence of a history of discrimination that was before Congress when it enacted the PWEA, the *Fullilove* Court observed that "much of that history related to the experience of minority businesses in the area of federal procurement," rather than their experience in local construction contracting. 448 U.S. at 478. The Small

Business Act was designed to address the very race discrimination in federal procurement referred to in *Fullilove* and Congress had ample evidence of such discrimination before it when it adopted the Act's DBE preference and its presumption of minority business enterprise disadvantage.[10]

Although the Court in *Fullilove* did not require "preambulary 'findings'" in order to uphold the PWEA, 448 U.S. at 478, such findings are, in fact, present in the Small Business Act. The Small Business Act states its purpose to "promote the business development of small business concerns owned and controlled by socially and economically disadvantaged individuals so that such concerns can compete on an equal basis in the American economy." 15 U.S.C. 631(f)(2)(A). In addition, Congress made express findings of disadvantage experienced by members of minority groups that support the presumptive inclusion of businesses owned by such persons in the preferences for disadvantaged business. 15 U.S.C. 631(f).

Contrary to petitioner's contentions, Pet. 23-24 & n.26, no separate findings of a history of state-sponsored discrimination within Colorado are required in order to

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[10] See, *e.g.*, *Hearings on Federal Contracting Opportunities for Minority and Women-Owned Businesses: An Examination of the 8(d) Subcontracting Program Before the Senate Comm. on Small Business*, 98th Cong., 1st Sess. (1983); *Hearings on the State of Hispanic Small Business in America Before the Subcomm. on SBA and SBIC Authority, Minority Enterprise and General Small Business Problems of the House Comm. on Small Business*, 99th Cong., 1st Sess. (1985); *Hearings on Minority Enterprise and General Small Business Problems Before the Subcomm. on SBA and SBIC Authority, Minority Enterprise and General Small Business Problems of the Comm. on Small Business*, 99th Cong., 2d Sess. (1986).

support the CFLHD's use of a percentage benchmark exceeding the Small Business Act's 5% floor for the government-wide DBE goal. Petitioner contends that the subsidiary goals assigned to each agency and agency component under the Act should receive strict judicial scrutiny.[11] This contention is incorrect for at least two reasons. First, as noted, the percentages themselves are not race-based, but turn on disadvantage. Petitioner fails to meet the requirements for the SCC benefit because it is not a disadvantaged business. Second, the SCC's 10% DBE subcontracting threshold is authorized by the Small Business Act, and, indeed, is the precise percentage Congress itself has expressly required on federal highway projects.[12] The CFLHD's annual 12-15% DBE goal is also authorized by the Small Business Act. Cf. *Harrison & Burrowes Bridge Constructors* v. *Cuomo*, 981 F.2d 50, 57-58 (2d Cir. 1992) (commenting that although a set-aside "vastly greater than the ten per cent minimum" set by the federal statute might be problematic, New York's 17% goal for the state-

[11] Petitioner refers to the 12 to 15% overall DBE goal which CFLHD was assigned in 1989. Pet. 23. The percentage figure relevant in assessing the constitutionality of the SCC and its application here, however, is the SCC's 10% DBE subcontract threshold. That was the percentage of DBE subcontracting Mountain Gravel was required to attain before being eligible for the monetary benefit the SCC promised, and it is thus the operative percentage figure in the decision petitioner challenges.

[12] Although the SCC was developed pursuant to the Small Business Act, pp. 5-6, *supra*, the funding for the West Delores Project was granted under STURAA, n.7, *supra*. Section 106(c) of STURAA includes a waiveable requirement that recipients meet a 10% DBE contracting goal. Pub. L. 100-17, 101 Stat. 145-146; 49 C.F.R. 23.68(c) (regarding waiver).

administered portion of the federal program was "within the bounds" set by the statute).

The courts of appeals have uniformly rejected any requirement of subsidiary findings at the state level when a State applies a federal program. See, *e.g.*, *Harrison & Burrowes Bridge Constructors* v. *Cuomo*, 981 F.2d 50; *Ellis* v. *Skinner*, 961 F.2d 912, 916 (10th Cir.), cert. denied, 113 S. Ct. 374 (1992); *Tennessee Asphalt*, 942 F.2d at 975; *Milwaukee County Paver's Ass'n* v. *Fiedler*, 922 F.2d at 423-424. Any such requirement would be even more unwarranted here, where a federal program is applied not by the States, but by the federal government itself.

3. Petitioner contends that the Subcontracting Compensation Clause is unconstitutional because it is insufficiently flexible and tailored to its purpose. Pet. 14-20. The court of appeals properly held, however, that the Small Business Act DBE preference, and CFLHD's implementation of it through the SCC, are carefully designed to ensure that they impose no unnecessary burdens, and are closely tailored to the precise problem Congress sought to address.

Petitioner contends that the Small Business Act lacks a required waiver provision. Pet. 14-16. That contention is incorrect in several ways. First, the SCC provision at issue in this case does not impose a goal, so no waiver is needed. Instead of requiring prime contractors to hire a certain percentage of DBE subcontractors in order to be awarded federal contracts, CFLHD contracts are awarded without regard to DBE participation, and the successful bidder is then offered the option of subcontracting ten percent or more of the project to DBEs and obtaining additional monetary compensation. If the contractor fails to take advantage of that option, it need not offer any justification to retain its contract.

Because the SCC operates as a carrot rather than a stick, it is even more flexible than the waiveable MBE goal upheld in *Fullilove*. Second, because the Small Business Act's goals are not race-based, no waiver of those goals is required. Unlike the goals upheld in *Fullilove*, which were restricted to minority businesses, the Small Business Act goals include non-minority DBES, and exclude minority businesses that are not disadvantaged. 15 U.S.C. 637(d)(3)(C)(i) (1988 & Supp. IV 1992); 49 C.F.R. Pt. 23, Subpt. D, App. C; 15 U.S.C. 637(a)(6)(C) (1988 & Supp. IV 1992). The provision for rebuttal in those cases where race does not actually correlate with disadvantage provides the same kind of flexibility and tailoring that waiver provisions provide where race-based goals are used. Third, even though no waiver is constitutionally required for race-neutral goals, regulations implementing DBE contracting requirements for DOT authorize waiver of applicable contracting goals where there are insufficient DBE contractors available to satisfy a designated goal. See 49 C.F.R. 23.64(e), 23.65 and Pt. 23, Subpt. D, App. D.

The court of appeals held that the program was "appropriately limited in extent and duration" because it is subject to regular examination by Congress. Pet. App. 23, citing *Fullilove*, 448 U.S. at 489. Contrary to petitioner's contention, Pet. 17-19, no formal termination date is needed because the DBE program is continually reviewed and adjusted to current circumstances. Cf. *Fullilove*, 448 U.S. at 523 (Powell, J., concurring). Rather than setting one static goal, as did the Public Works Employment Act reviewed in *Fullilove*, the Small Business Act requires that DBE goals be adjusted annually. The fact that Executive agencies are involved in implementing the goals through the establishment of subsidiary goals, 15 U.S.C. 644(g), adds to the program's

flexibility. The agencies know their own procurement needs in each locale in which they operate, and are closest to the industries affected by the DBE goals. A requirement that Congress formally enact each agency goal and sub-goal would not only unduly burden Congress and produce legislation on a scale comparable to the Internal Revenue Code, but would detract from the close tailoring and flexibility that is afforded by agency involvement in setting annual goals.

Petitioner also contends that the court of appeals erred in concluding that the DBE program was narrowly tailored. Pet. 19-20. As the court of appeals recognized, Pet. App. 23, however, the DBE program is better tailored than the MBE program in *Fullilove*. That program made eligible only those businesses owned and controlled by members of racial minorities. Under the Small Business Act and the SCC, on the other hand, DBE status is not limited to members of racial minority groups. Cf. *Croson*, 488 U.S. at 507 (commenting that the City should have tried race-neutral assistance to small firms before adopting a race-based quota). Eligibility as a DBE is open to any small business owner who is socially and economically disadvantaged. 48 C.F.R. 19.703; 49 C.F.R. 23.62, Subpt. D, App. A and C. Moreover, although businesses owned by members of racial minority groups are presumed to be socially and economically disadvantaged, that presumption is rebuttable. 15 U.S.C. 637(a)(6)(C) (1988 & Supp. IV 1992); 48 C.F.R. 19.703; 49 C.F.R. 23.62, 23.69, and Pt. 23, Subpt. D, App. A.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 93-1841

In The

Supreme Court of the United States

October Term, 1994

ADARAND CONSTRUCTORS, INC.,

Petitioner,

v.

FEDERICO PENA, Secretary of Department of Transportation; THOMAS D. LARSEN, Administrator of the Federal Highway Administration; LOUIS N. MACDONALD, Administrator Region VIII of the Federal Highway Administration; and JERRY BUDWIG, Division Engineer of the Central Federal Lands Highway Division,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

REPLY TO OPPOSITION

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REPLY TO OPPOSITION

ARGUMENT

I. THE STATUTE IN QUESTION CREATES A RACE-BASED CLASSIFICATION THAT USES RACE AS THE DECIDING FACTOR IN ESTABLISHING GOALS.

Respondents assert that "[a]lthough the Small Business Act employs race as a factor, its goals are not based on race, but on disadvantage. . . . [and that t]here is no question on the record in this case that Gonzales was in

fact disadvantaged, and petitioner was not."[1] Respondents further aver: "Section 8(a) of the Act, 15 U.S.C. § 637(a), defines social and economic disadvantage in race-neutral terms."[2] From this "factual" predicate, Respondents argue:

> Indeed, if [Adarand] were a [Disadvantaged Business Enterprise] DBE similarly situated to Gonzales in every way but the race of the persons who own and operate [Adarand] and had made a lower bid than Gonzales, [Adarand] would, no doubt, have been awarded the subcontract.[3]

Respondents' argument fails because its "factual" foundation is simply untrue. The Small Business Act not only employs race as a factor, race is the only factor. That is, an individual is presumed to be disadvantaged if his race is one of those listed in the Small Business Act. Moreover, there is no evidence "on the record" that Gonzales is disadvantaged, only that he is Hispanic, which is one of the races listed as presumably disadvantaged. Furthermore, the Small Business Act does not define disadvantage in "race-neutral terms" but in racial terms since those of the listed races are presumed to be "disadvantaged." Finally, even if Adarand were able to apply for and receive DBE status, the Small Business Act is constitutionally deficient since racial minorities need not demonstrate that they are disadvantaged to be certified as DBEs. Racial minorities need show only that their race is one of those listed as presumptively disadvantaged in the Small Business Act.

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[1] Opp. to Pet. 11-12.

[2] Opp. to Pet. 3, n.3.

[3] Opp. to Pet. 11.

Thus, as to the express provisions of the Small Business Act, Respondents are in error. Respondents' argument that the statutory scheme has a "racial component, but is not exclusively race-based" is without a factual basis. The payment of the bonus to the prime contractors in accordance with the Subcontracting Compensation Clause (SCC) turns upon the race of the subcontractor and upon no other factor.[4] This is clear from the statutory definition of "social and economic disadvantage":

> Socially disadvantaged individuals are those who have been subjected to *racial or ethnic prejudice or cultural bias because of their identity as a member of a group* without regard to their individual qualities.

15 U.S.C. § 637(a)(5). (Emphasis added.) "Economically disadvantaged" means:

> *those socially disadvantaged individuals* whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged.

15 U.S.C. § 637(a)(6). (Emphasis added.) Thus, only individuals who are "socially disadvantaged," that is, of certain specified racial and ethnic status can be "economically disadvantaged."[5]

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[4] Opp. to Pet. 3.

[5] "Recipients should always make a determination of social disadvantage before proceeding to make a determination of economic disadvantage. *If the recipient determines that the individual is not socially disadvantaged, it is not necessary to make the economic disadvantage determination.*" 49 C.F.R. Pt. 23, Subpt. D, App. C. (Emphasis added.)

This Court has held that a racial classification is "a line drawn on the basis of race and[/or] ethnic status,"[6] and that the constitutional guarantee of equal protection is violated if persons of different races "are not accorded the same protection."[7] The statute in question is clearly race-based because it establishes classifications and draws lines on the basis of race or ethnic status and no other basis.

Moreover, the fallacy of the argument that the Small Business Act is based upon race-neutral definitions is obvious. A statutorily listed minority member obtains DBE status merely by proving his or her membership in one or more of the presumed disadvantaged minorities.[8] "In making certification decisions, the recipient relies on this presumption, and does not investigate the social or economic status of individuals who fall into one of the presumptive groups."[9] Nothing else is required.[10]

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[6] *Regents of the University of California v. Bakke*, 438 U.S. 265, 289 (1978).

[7] *Id.* (Emphasis added.)

[8] The statutorily presumed disadvantaged minorities are: "Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities." 15 U.S.C. § 637(d)(3)(C).

[9] 49 C.F.R. Pt. 23, Subpt. D, App. A, at page 216 (10-1-92 Edition).

[10] Respondents are disingenuous when they assert that the DBE status of a minority can be "rebutted if it is shown, based on information provided from any source, that 'the firm's owners are not truly socially and/or economically disadvantaged.' " Opp. to Pet. 6. What Respondents fail to explain is that the burden to "rebut" the DBE status of an individual is placed upon third parties, not the governmental agency. 49 C.F.R. § 23.69. Thus, the party challenging the DBE status of an individual must provide the evidence that the challenged minority is not "socially and economically disadvantaged." The burden is on the wrong party. The party seeking to be benefitted by the program should have the burden of proving, not just his or her race or ethnic origins, but the nature of his or her "social" and/or "economic disadvantage."

The Small Business Act is race-based and Respondents' attempts to portray it as otherwise are without merit.

II. STRICT SCRUTINY, NOT INTERMEDIATE SCRUTINY AS HELD BY THE TENTH CIRCUIT COURT OF APPEALS, IS THE STANDARD OF REVIEW THIS COURT REQUIRES FOR A RACE-BASED STATUTE.

Respondents failed to respond to Adarand's arguments that neither *Fullilove v. Klutznick*, 448 U.S. 448, 545 (1980) nor *Metro Broadcasting v. FCC*, 497 U.S. 547, 601 (1990) provide the necessary authority to overrule the Court's previous holdings that "the most rigid scrutiny" must be applied when race is the primary factor in government decision making.[11] Therefore, the proper standard is "strict scrutiny."[12]

Respondents argue that "*Fullilove* did not employ strict scrutiny, nor is such scrutiny appropriate here."[13] Respondents are wrong on both counts. *Fullilove* held that "careful judicial evaluation," "narrow tailoring" and "most searching examination" must be utilized when reviewing race-based programs.[14] These are the characteristics of strict, not intermediate scrutiny.

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[11] *Korematsu v. United States*, 323 U.S. 214, 216 (1944) and *Virginia v. Loving*, 388 U.S. 1, 11 (1967).

[12] Pet. at 12-13.

[13] Opp. to Pet. 12.

[14] *Fullilove*, 448 U.S. at 480 and 491.

Contrary to the contention of Respondents, strict scrutiny must be applied in this case. This Court has held that "the most rigid scrutiny" must be applied to racial classifications. *Korematsu v. United States*, 323 U.S. 214, 216 (1944). *See* also *University of California Regents v. Bakke*, 438 U.S. 265, 299 (1978); *Virginia v. Loving*, 388 U.S. 1, 11 (1967); and *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954). Respondents' attempt to show otherwise fails.

Respondents cite *Metro Broadcasting* as authority for the proposition that intermediate scrutiny is the appropriate standard of review. Yet, Respondents cannot rely upon *Metro Broadcasting* since that Court appears to hold that strict scrutiny is the proper standard to be applied in this case.[15] In *Metro Broadcasting* Justice Stevens wrote a concurring opinion in which he expressed concern regarding the standard of review. Obviously, Justice Stevens believed – while supporting the holding of the Court – that "strict scrutiny" should be applied, in all but a very limited number of cases. Justice Stevens' concurrence in *Metro Broadcasting* and his dissent in *Fullilove* clearly set forth his view on the proper standard:

> [u]nless Congress *clearly articulates the need* and basis for a racial classification, and also *tailors the classification to its justification*, the Court should not uphold this kind of statute.

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[15] As explained in text, Justice Stevens' concurring opinion in which he addresses the appropriate standard of review when combined with the four dissenting Justices who also favored strict scrutiny constitutes a majority of the Court. *Metro Broadcasting*, 497 U.S. at 603 (dissent of Justice O'Connor) and 633 (dissent of Justice Kennedy). Furthermore, as explained in Adarand's Petition, important constitutional precedent must not be overruled by implication. Pet. 20-21

Fullilove, 448 U.S. at 545. (Emphasis added.) "Clearly articulates the need and basis" and "tailors the classification to its justification" are the same as the compelling governmental interest and the narrow tailoring tests required under strict scrutiny.[16] Justice Stevens' views on the proper standard of review are clear from his opinion in *Metro Broadcasting*:

> racial or ethnic characteristics provide a relevant basis for disparate treatment *only in extremely rare situations* and that it is therefore "especially important that the reasons for any such classification be clearly identified and *unquestionably legitimate*."

Metro Broadcasting, 497 U.S. at 601. (Emphasis added.) Contrary to Respondents' assertion, Justice Stevens has never held – neither in *Fullilove* nor *Metro Broadcasting* – that intermediate scrutiny is the proper standard to apply when reviewing a race-based classification.

III. "SOCIETAL DISCRIMINATION" CITED BY CONGRESS DOES NOT PROVIDE SUFFICIENT AUTHORITY TO JUSTIFY THE USE OF A RACE-BASED PROGRAM BY FEDERAL OFFICIALS IN COLORADO.

Respondents argue that "Congress made express findings of disadvantage experienced by members of minority groups that support the presumptive inclusion

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[16] "There are two prongs to this examination. . . . First [it] 'must be justified by a compelling governmental interest' [and] [s]econd it must be 'narrowly tailored to the achievement of that goal.'" *Wygant v. Jackson Board of Education*, 476 U.S. 267, 274 (1986). *See* also *Metro Broadcasting v. FCC*, 497 U.S. at 603, (dissenting opinion of Justice O'Connor, citing *Richmond v. J.A. Croson*, 488 U.S. 469 (1989) and *Bolling v. Sharpe*, 347 U.S. 497 (1954).

of businesses owned by such persons in the preference for disadvantaged business. 15 U.S.C. § 631(f)."[17]

Respondents admit that the Central Federal Lands Highway Division (CFLHD) has never discriminated on the basis of race.[18] Yet, Respondents take the position that "societal discrimination" is sufficient to justify the use of a race-based program by that agency in Colorado. However, this Court has held that "societal discrimination" is not enough:

> This Court *never has held that societal discrimination alone is sufficient to justify a racial classification*. Rather, the court has insisted upon some showing of prior discrimination by the governmental unit involved before allowing limited use of racial classifications in order to *remedy* such discrimination.

Wygant, 476 U.S. at 274. (Emphasis added.) The reason is simple, "it is almost impossible to assess whether [this] plan is narrowly tailored to remedy prior discrimination since it is not linked to identified discrimination in any way." *Croson*, 488 U.S. at 498.

"Societal discrimination" cited by Congress does not provide sufficient constitutional authority to justify the

---

[17] Opp. to Pet. 15. Even if Congress made findings with the specificity this Court demands, and it did not, those findings were made nearly a decade ago. If there was a pattern of race-based discrimination – and Respondents have testified there was not – the defect has been long cured. Thus, what is present here is a remedy that is "ageless in [its] reach into the past, and timeless in [its] ability to affect the future." *Wygant*, 476 U.S. at 276.

[18] In a deposition taken on March 19, 1991, Mr. Jerry Budwig, Division Engineer of the CFLHD testified "I would say that there has not been," when asked if he knew if the CFLHD had ever discriminated. App. 45-46.

use of a race-based program by Federal Officials in Colorado. The decision of the Tenth Circuit is in error, conflicts with the holdings of this Honorable Court, and must be reversed.

IV. PRIVATE DISCRIMINATION IS "EVIL" AND JUST AS "ODIOUS TO A FREE PEOPLE" AS IS GOVERNMENTAL DISCRIMINATION.

Respondents argue that the race-based program does not require a waiver provision because the SCC "operates as a carrot rather than a stick."[19] Respondents argue that bribing a prime contractor with federal funds to discriminate is less constitutionally offensive than direct discrimination by the government entity itself. Private discrimination is "evil."[20] Respondents' attempt to hide behind the prime contractor, asserting that it is he and not the federal government which is discriminating on the basis of race, is meritless and must be rejected. Since federal funds provide the financial inducement to discriminate in accordance with federal regulations, the discrimination is being done by the federal government. "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality."[21] Government financing of private discrimination is "evil" and no less "odious to a free people whose institutions are founded upon the doctrine of equality"

---

[19] Opp. to Pet. 18.

[20] "It is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private discrimination." *Croson*, 488 U.S. at 492.

[21] *Bakke*, 438 U.S. at 290-91, citing *Hirabayashi v. United States*, 320 U.S. 81, 100 (1942).

since it is direct discrimination by the government itself. The decision of the Tenth Circuit Court of Appeals is in direct conflict with the decisions of this Court and it must be reversed.

CONCLUSION

Respondents have failed to provide any cogent reason for rejecting Adarand's request that this Court review and reverse the decision of the Tenth Circuit Court of Appeals. Therefore, Adarand's Petition for *Writ of Certiorari* should be granted.

Respectfully submitted,

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DATED: August 30, 1994

Supreme Court, U.S.
FILED
NOV 7 1994
OFFICE OF THE CLERK

No. 93-1841

In The

Supreme Court of the United States

October Term, 1994

ADARAND CONSTRUCTORS, INC.,

Petitioner,

vs.

FEDERICO PENA, SECRETARY OF TRANSPORTATION, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

JOINT APPENDIX

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8/10/90	1	COMPLAINT and Jury Demand (Summonses issued) (tp)
10/9/90	8	ANSWER by defendant Samuel K. Skinner, defendant Robert E. Farris, defendant Louis N. MacDonald, defendant Jerry Budwig (lm) [Entry date 10/11/90]
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4/24/91	19	BRIEF by dfts Samuel K. Skinner, Robert E. Farris, Louis N. MacDonald, Jerry Budwig in support of motion for summary judgment before Judge Jim R. Carrigan [18-1] (lm)
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4/24/91	24	EXHIBITS to pla's mtn for s/j (lm) [Entry date 04/25/91]
5/6/91	29	SUPPLEMENTAL by plaintiff Adarand Constructors exhibits in support of mtn for s/j [24-1] (lm) [Entry date 05/07/91]
5/13/91	32	BRIEF Amicus Curiae by movant Rocky Mt Enterprise, movant Commercial Energies in support of dfts' motion for summary judgment and in opp to pla's mtn for summary judgment before Judge Jim R. Carrigan [18-1] (lm) [Entry date 05/14/91]
5/15/91	33	MOTION by Rocky Mt Enterprise, Commercial Energies for leave to substitute attached Amicus Curiae Brief for draft brief filed on 5/13/91 (lm) [Entry date 05/16/91] [Edit date 05/16/91]
5/24/91	34	MEMORANDUM by plaintiff Adarand Constructors in opposition to motion for summary judgment before Judge Jim R. Carrigan [18-1] (lm) [Entry date 05/28/91]
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5/29/91	37	Supplemental EXHIBITS in support of their mtn for summary judgment in opp to pla's mtn for summary judgment (lm) [Entry date 05/30/91]
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11/26/91	41	Amicus Curiae BRIEF FILED by movant Rocky Mt Enterprise in support of dfts' mtn for s/j and in opp to pla's mtn for s/j regarding [33-1], regarding [32-1], regarding [18-1] (lm) [Entry date 12/02/91]
4/21/92	42	MEMORANDUM, OPINION, AND ORDER: by Judge Jim R. Carrigan granting dfts' motion for summary judgment [18-1]; denying pla's motion for summary judgment [22-1]; dismissing pla's claims and action with prejudice (cc: all counsel); entry date: 4/22/92 (lm) [Entry date 04/22/92]
7/17/92	44	MOTION by plaintiff Adarand Constructors to extend time (14 days from order entered upon this mtn) file notice of appeal (lm) [Entry date 07/20/92]
7/17/92	45	DECLARATION by Todd S. Welch in support of pla's motion to extend time to file notice of appeal [44-1] (lm) [Entry date 07/20/92]
7/20/92	46	Amended MOTION by plaintiff Adarand Constructors for ext of time (30 day ext or 10 days from the date of entry of the order granting the mtn, which ever comes later) to file notice of appeal (lm)

7/20/92	47	DECLARATION by Todd S. Welch in support of plaintiff's Adarand Constructors motion for ext of time to file notice of appeal [46-1] (lm)
7/23/92	49	RESPONSE by defendant to motion for ext of time (30 day ext or 10 days from the date of entry of the order granting the mtn, which ever comes later) to file notice of appeal [46-1] (lf) [Entry date 07/24/92]
8/3/92	50	MINUTE ORDER: by Judge Jim R. Carrigan granting motion for ext of time (30 day ext or 10 days from the date of entry of the order granting the mtn, which ever comes later) to file notice of appeal [46-1]. Hearing is vacated. (cc: all counsel); entry date: 8/5/92 (gc) [Entry date 08/05/92]
8/5/92	51	NOTICE OF APPEAL by plaintiff Adarand Constructors in re memorandum opinion and order [42-2] of 4/21/92; Notice of transcript order form due 8/15/92; Notice mailed to all counsel on 8/5/92 (gc)

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8/7/92	1	[612241] Civil case docketed. Preliminary record filed. Transcript order form due 8/17/92 for Deborah A. Stafford pursuant to R.42.1. Docketing statement due 8/17/92 for Adarand Constructors. Notice of appearance due 8/17/92 for Louis N. MacDonald, for Jerry Budwig, for Robert E. Farris, for Samuel K. Skinner, for Adarand Constructors. (mbm)
8/17/92	2	[614115] Docketing statement filed by Adarand Constructors. Original and 4 copies. c/s: y. (mbm)
8/17/92	3	[614166] Notice received from Appellant Adarand Constructors that a transcript is not necessary for this appeal. Notice due that record is complete 8/24/92 for Jim R. Carrigan. (mbm)
11/30/92	11	[637558] Appellant's brief filed by Adarand Constructors. Original and 7 copies. c/s: y. Served on 11/30/92 Oral argument? y., Appendix filed. Original and 1 appendix copy. Appellee/Respondent's brief due 1/4/93 for Louis N. MacDonald, for Jerry Budwig, for Robert E. Farris, for Samuel K. Skinner (jtp)

2/4/93	14	[653355] Appellee's brief filed by Samuel K. Skinner, Robert E. Farris, Jerry Budwig, Louis N. MacDonald. Original and 7 copies. c/s: y. Served on 2/3/93. Oral Argument? y. Appendix filed. Original and 1 appendix copy. Appellant's optional reply brief due 2/22/93 for Adarand Constructors. (pdw)
2/17/93	17	[655716] Appellant's reply brief filed by Adarand Constructors. Original and 7 copies. c/s: y. (pdw)
9/29/93	25	[712317] Case argued and submitted to Judges McKay, Holloway, Garth. (sls)
2/16/94	26	[743222] Terminated on the Merits after Oral Hearing; Affirmed; Written, Signed, Published, McKay; Holloway; Garth, authoring judge. [92-1242] (mbm)
5/23/94	29	[768362] Petition for writ of certiorari filed on 5/17/94 by Appellant Adarand Constructors. Supreme Court Number 93-1841. (afw)
10/3/94	31	[799259] Supreme Court order dated 9/26/94 granting certiorari filed. (afw)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

CIVIL ACTION NO. 90-1413

ADARAND CONSTRUCTORS, INC.
a Colorado Corporation,

Plaintiff,

v.

SAMUEL K. SKINNER, Secretary of the Department of Transportation, ROBERT E. FARRIS, Administrator of the Federal Highway Administration, LOUIS N. MACDONALD, Administrator of Region VIII of the Federal Highway Administration, and JERRY BUDWIG, Division Engineer of the Central Federal Lands Highway Division,

Defendants.

COMPLAINT AND JURY DEMAND

COMES NOW Plaintiff, ADARAND CONSTRUCTORS, INC., by and through its attorneys, Mountain States Legal Foundation, and for its complaint against Defendants, alleges as follows:

PARTIES

1. Plaintiff is a Colorado Corporation, incorporated under the laws of the State of Colorado, with its principle

place of business in Colorado Springs, Colorado, and is a citizen of the State of Colorado.

2. Defendant Samuel K. Skinner is the Secretary of the United States Department of Transportation ("the Secretary"). Under the Surface Transportation Assistance Act of 1982 ("STAA") and the Surface Transportation and Uniform Relocation Assistance Act of 1987 ("STURAA"), the Secretary is charged with the administration of those statutes and other Federal statutes though [sic] the promulgation and enforcement of regulations.

3. Defendant Robert E. Farris is the Administrator of the Federal Highway Administration ("FHA"). Defendant Farris is responsible for the administration and enforcement of STAA and STURAA, subject to the supervision of Defendant Skinner.

4. Defendant Louis N. MacDonald is the Regional Administrator of the FHA for Region VIII, whose territory and jurisdiction include the State of Colorado. Defendant MacDonald is responsible for the administration and enforcement of STAA and STURAA by the FHA in the State of Colorado, subject to the supervision of Defendants Skinner and Farris.

5. Defendant Jerry Budwig is the Division Engineer of the Central Federal Lands Highway Division of the FHA, Department of Transportation and is charged with the administration and supervision of all contracts let by any federal agency on federal lands within the states which comprise the Central Federal Lands Highway Division including the State of Colorado, subject to the supervision of Defendants Skinner, Farris and MacDonald.

JURISDICTION AND VENUE

6. This action arises out of the requirements of § 105(f) of STAA, P.L. 97-424, and § 106(c) of STURAA, P.L. 100-17, and is brought to secure the rights of ADARAND CONSTRUCTORS, INC., as guaranteed by the due process and equal protection components of the Fifth Amendment, the equal protection clause of the Fourteenth Amendment, the Civil Rights Act of 1871, as amended, 42 U.S.C. § 1983, and Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000(d). Plaintiff seeks relief from STAA and STURAA pursuant to 28 U.S.C. §§ 2201 and 2202. Jurisdiction in this Court is properly invoked pursuant to 28 U.S.C. § 1331 and § 1343.

7. Venue is properly in this Court pursuant to 28 U.S.C § 1391, in that the contracts and work which give rise to this cause of action occurred in the State of Colorado.

STATEMENT OF FACTS

8. In 1982, Congress enacted STAA and, in 1987, Congress enacted STURAA. Prior to the enactment of STAA and STURAA, Plaintiff could bid for subcontracts on federally funded-highway construction projects, whether the contracts were state highway contracts funded, in whole or in part, by federal monies or federal projects.

9. Section 105(f) of STAA provides that not less than 10 per cent [sic] of all appropriated federal monies under STAA will be spent on contracts with Minority Business

Enterprises (MBE) and Disadvantaged Business Enterprises (DBE) unless the Secretary determines otherwise. Section 106(c) of STURAA provides that not less than 10 percent of all appropriated federal monies under STURAA will be spent on contracts with Disadvantaged Business Enterprises (DBE) unless the Secretary determines otherwise. The legislative history of these Acts contains no description of any findings made by Congress of discrimination in the award of federally funded highway construction contracts.

10. Regulations implementing the provisions of STAA and STURAA were promulgated, revised and adopted by the Department of Transportation ("DOT"). These regulations are codified at 49 C.F.R., part 23. The regulations provide that the ten percent (10%) requirement for MBE-DBE participation will be achieved if the recipients of the federal funds establish and award at least ten percent (10%) of all federal contract monies to certified MBE-DBE participants. 49 C.F.R. § 23.61(b).

11. The Central Federal Land Highway Division has established specific procedures and contract provisions to meet the MBE/DBE requirements of STAA and STURRA. "The Notice to Bidders and Offerors" sent to each bidder on projects offered by the Central Federal Lands Highway Division states on page 1 of 3:

> UTILIZATION OF SMALL BUSINESS AND SMALL DISADVANTAGED BUSINESS CONCERNS, WOMEN-OWNED BUSINESS CONCERNS, AND SMALL AND SMALL DISADVANTAGED BUSINESS SUBCONTRACTING PROGRAM

Bidders should note their responsibilities in the awarding of subcontracts in accordance with the Utilization of Small Business Concerns and Small Business Concerns Owned and Controlled by Socially and Economically Disadvantaged individuals clause and with the Women-owned Business Concerns clause which are included in the Contract Clauses section of this contract.

The Bidder, if a big business concern, should note their responsibility to establish and conduct a Small Business and Small Disadvantaged Business Subcontracting Program in accordance with The Small Business and Small Disadvantaged Business Subcontracting Plan clause included in Contract Clause 52.219.9, Alternate I. The successful Low Bidder will be required to submit a Subcontracting Plan within 2 weeks of the opening of bids. *If the apparent successful bidder fails to submit a subcontracting plan acceptable to the contracting officer within the allowable time, that bidder may be ineligible for award of the contract.*

(emphasis added).

12. In the "Proposal and Contract" under *FEDERAL ACQUISITION REGULATION CONTRACT CLAUSES* pages F-13 through F-16, § 52.219-9, entitled SMALL BUSINESS AND SMALL DISADVANTAGED BUSINESS SUBCONTRACTING PLAN. (APRIL 1984) ALTERNATE 1 (APRIL 1984), the contract provides, in part, as follows:

> (c) The apparent low bidder, upon request by the Contracting Officer, shall submit a subcontracting plan, where applicable, which addresses separately subcontracting with small business concerns and small disadvantaged

business concerns, and which shall be included in and made part of the resultant contract. The subcontracting plan shall be submitted within the time specified by the Contracting Officer. *Failure to submit the subcontracting plan shall make the bidder ineligible for the award of a contract.*

(d) The offeror's subcontracting plan shall include the following:

(1) Goals, expressed in terms of percentages of total planned subcontracting dollars, for the use of small business concerns and small disadvantaged business concerns as subcontractors. The offeror shall include all subcontracts that contribute to contract performance, and may include a proportionate share of products and services that are normally allocated as indirect costs.

(2) A statement of –

(i) Total dollars planned to be subcontracted;

(ii) Total dollars planned to be subcontracted to small business concerns; and

(iii) Total dollars planned to be subcontracted to small disadvantaged business concerns.

(3) A description of the principal types of supplies and services to be subcontracted, and an identification of the types planned for subcontracting to (i) small business concerns and (ii) small disadvantaged business concerns.

(4) A description of the method used to develop the subcontracting goals in (1) above.

* * *

(9) Assurances that the offeror will include the clause in this contract entitled "Utilization of Small Business Concerns and Small Disadvantaged Business Concerns" in all subcontracts that offer further subcontracting opportunities, and that the offeror will require all subcontractors (except small business concerns) who receive subcontracts in excess of $500,000 ($1,000,000 for construction of any public facility), to adopt a plan similar to the plan agreed to by the offeror.

* * *

(i) *The failure of the Contractor or subcontractor to comply in good faith with (1) the clause of this contract entitled "Utilization of Small Business Concerns and Small Disadvantaged Business Concerns," or (2) an approved plan required by this clause, shall be a material breach of the contract.*

(emphasis added)

13. "The Proposal and Contract" in the *SPECIAL CONTRACT REQUIREMENTS* section, page I-1, provides:

> The following special Contract Requirements amend and supplement the Standard Specifications for Construction of Roads and Bridges on Federal Highway Projects, FP-85. U.S. Department of Transportation, Federal Highway Administration.

Section 108, located on pages I-24 through I-26, provides, in part:

Section 108. – PROSECUTION AND PROGRESS

108.01 *Subcontracting.* This subsection is supplemented to include a Disadvantaged Business Enterprise (DBE) Development and Subcontracting Compensation Provision as follows:

Monetary compensation is offered for awarding subcontracts to small business concerns owned and controlled by socially and economically disadvantaged individuals. A DBE shall mean a small business concern owned and controlled by socially and economically disadvantaged individuals as defined under the FAR Contract Clause 52.219-8 entitled "Utilization of Small Business Concerns Owned and Controlled by Socially and Economically Disadvantaged Individuals" or a woman owned business as defined under FAR Contract Clause 52.219-13.

A small business concern will be considered a DBE after it has been certified as such by the U.S. Small Business Administration or any State Highway Agency. Certification by other Government agencies, counties, or cities may be acceptable on an individual basis provided the Contracting Officer has determined the certifying agency has an acceptable and viable DBE certification program. If the Contractor requests payment under this provision, the Contractor shall furnish the Engineer with acceptable evidence of the Subcontractor(s) DBE certification and shall furnish one certified copy of the executed subcontract(s).

Compensation is provided to the Contractor to locate, train, utilize, assist, and develop DBE's to become fully qualified contractors in the transportation facilities construction field.

The Contractor shall also provide direct assistance to disadvantage subcontractors in acquiring necessary bonding, obtaining price quotations, analyzing plans and specifications, and planning and management of the work. The Contractor shall maintain records documenting these activities and shall make them available for Government review upon request.

If the DBE subcontractor subcontracts (2nd tier) all or part of its work to a non-DBE subcontractor, payment under this provision may be adjusted accordingly by the Engineer. The prime contractor may only receive compensation for that portion of subcontract work which is actually performed by DBEs. However, if the DBE subcontractor subcontracts only insignificant portions of the subcontract while still doing the major portion of the work, the prime contractor may receive full compensation under this provision.

For each subcontract, the subcontracted work, except for purchased materials, must be performed at the project site, and, except for engineering services, the labor associated with that work must be subject to the Labor Standards Provisions of the contract.

The Contractor will become eligible to receive payment under this subcontracting compensation provision when the dollar amount (based on final subcontract amount) of the disadvantaged business enterprise subcontract(s) awarded exceeds 10 percent of the original contract amount.

The Contractor will be paid an amount computed as follows:

1. If a subcontract is awarded to one DBE, 10 percent of the final amount of the approved DBE subcontract, not to exceed 1.5 percent of the original contract amount.

2. If subcontracts are awarded to two or more DBEs, 10 percent of the final amount of the approved DBE subcontracts, not to exceed 2 percent of the original contract amount.

Payment will be made as follows:

1. Fifty percent of the computed amount (based on original subcontract amount) will be paid when the DBE subcontractor(s) commences work on the project.

2. The remainder of the computed amount (based on the final subcontract amount) will be paid when the DBE subcontractor(s) has satisfactorily completed all subcontract work.

This payment will be full compensation for locating, selecting, training, and assisting DBE subcontractors; for maintaining supporting records; and for supplying all facilities and services to complete this DBE subcontracting provision.

Upon completion of the subcontract work, the Contractor shall furnish a certified copy of acceptable records supporting the final amount(s) paid to or on behalf of the DBE subcontractor(s).

Item 108(2) of the bid schedule provides an estimated contingent sum amount to cover the cost of this provision.

(emphasis added)

14. The use of the above described contract provisions compel the Prime Contractor bidding on federal highway projects to discriminate against certain classes of subcontractors because of their gender, race, sex or national origin. The use of the "bonus" provisions above described rewards prime contractors for their discrimination practices against certain classes of subcontractors based on their gender, race, sex or national origin.

15. Plaintiff ADARAND CONSTRUCTORS, INC. is a corporation operated primarily by Randy Pech, a caucasian male under the age of 60 years and is not qualified as a Disadvantaged Business Enterprise.

16. On or about August 10, 1989, the FHA, Central Federal Lands Highway Division, sent out a "PRE-SOLICITATION NOTICE (CONSTRUCTION CONTRACT) for Project No. CO FH 60-2(2)," with the project Title and Location as "Colorado FH 60-2(2), West Delores, Delores County." The notice provided that the offers (bids) from prime contractors were to be received by 2:00 P.M. on September 12, 1989. In the notice, number 11, "offers covering the project restricted to small business," is answered "no." Number 12 "subcontracting program required?," is marked neither "yes" nor "no."

17. The West Delores Project proposal and contract contained the standard contract provisions set forth in paragraphs numbered 11 to 13 above which compel and reward prime contractors in discriminatory practices.

18. Mountain Gravel & Construction Company of Delores, Colorado was one of the prime contractors submitting a bid to the Central Federal Highway Lands Division on the West Delores project. In response to a

request from Mountain Gravel & Construction Company for subcontracting bids Plaintiff submitted a bid for the guardrail work on the West Delores Project on September 11, 1989.

19. Shortly thereafter, Mountain Gravel & Construction Company was awarded the prime contract for the West Delores Project, including the construction of the guardrail, by the Central Federal Lands Highway Division of the FHA.

20. Since Mountain Gravel & Construction Company, as the prime contractor, is compelled and rewarded for discriminatory practices by the minority requirements of the contract and even though Plaintiff, as a guardrail subcontractor, was the low bidder for the guardrail work submitted on the West Delores Project to Mountain Gravel & Construction Company and although Plaintiff is qualified, competent, proficient and capable, the subcontract was awarded to Gonzales Construction, a Disadvantaged Business Enterprise (DBE).

21. Plaintiff believes and alleges that Mountain Gravel & Construction Company was compelled and required by the contract provisions promulgated by the Central Federal Lands Highway Division to submit a subcontracting plan that would award the subcontract to Gonzales Construction and that Mountain Gravel & Construction Company would be rewarded by a "bonus" as described above for awarding the subcontract on the guardrail to Gonzales Construction rather than to Plaintiff.

22. Plaintiff believes and alleges that such conduct by the Central Federal Lands Highway Division discriminates against Plaintiff because of gender, race, sex, and national origin contrary to the equal protection and due process clauses of the Fifth Amendment and the equal protection clause of the Fourteenth Amendment to the United States Constitution.

23. As a direct result of STAA, STURAA, the regulations promulgated thereunder, and the contract provisions established as a result of STAA, STURAA, and the regulations, as enforced by the defendants, Plaintiff has been denied the award of specialty subcontract work on account of the gender, race, sex or national origin of its operator. If STAA, STURAA, the regulations and contract provisions were declared unconstitutional, Plaintiff could bid for and receive contracts free from discrimination on account of gender, race, sex or national origin.

24. Plaintiff is injured by being denied an opportunity to meaningfully participate in the bidding for and performance of contacts for the construction of public highways funded with federal monies on account of gender, race, sex or national origin, and will continue to suffer this harm and injury as a direct result of Defendants' actions.

25. Plaintiff believes and alleges that Defendants have made no findings of discrimination in the award of federal construction contracts to justify the use of racial or gender preferences in the award of federal highway construction contracts.

26. The result of Defendants' actions is a system of rigid, inflexible quotas, which creates naked racial and

gender preferences that discriminate against Plaintiff and other innocent third parties.

COUNT ONE

27. Plaintiff realleges and incorporates by reference the allegations set forth in paragraphs 1 through 26 of this Complaint.

28. Section 105 (f) of STAA and section 106 (c) of STURAA require the use of racial and gender preferences in the award of federally financed highway construction contracts, without any findings of past discrimination in the award of such contracts.

29. Such racial and gender preferences on their face violate the Fifth and Fourteenth Amendments to the United States Constitution and are therefore unconstitutional and must be struck down.

COUNT TWO

30. Plaintiff realleges and incorporates by reference the allegations set forth in paragraphs 1 through 29 of this Complaint.

31. The actions of Defendants in the use of their regulations and contract provisions which require the use of race and gender as a factor in the award of federally financed highway construction contracts, discriminate against Plaintiff in violation of the due process and equal protection components of the Fifth Amendment to the United States Constitution and are unconstitutional and must be struck down.

COUNT THREE

32. Plaintiff realleges and incorporates by reference the allegations set forth in Paragraphs 1 through 31 of the Complaint.

33. The actions of Defendants, in their development and administration of the DBE program, constitute government action. By requiring subcontract awards based on gender or race or granting successful prime contract bidders a bonus based on said prime contractor granting the subcontract based on gender or race, the defendants have discriminated against Plaintiff in violation of the Equal Protection Clause of the Fifth and Fourteenth Amendments and are unconstitutional and must be struck down.

COUNT FOUR

34. Plaintiff realleges and incorporates by reference the allegations set forth in paragraphs 1 through 33 of the Complaint.

35. The concerted actions of Defendants deprive Plaintiff of rights, privileges and immunities secured by the United States under 42 U.S.C. § 1983.

COUNT FIVE

36. Plaintiff realleges and incorporates by reference the allegations set forth in paragraphs 1 through 35 of the Complaint.

37. The use of race as a factor in the award of federally financed contracts, by excluding Plaintiff from

participation in federal funded highway construction projects on the basis of gender or race, violates the provisions of Title VI, § 601 of the Civil Rights Act of 1964, 42 U.S.C. § 2000(d).

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that this Honorable Court grant the following relief:

1. Entry of a judgment declaring that § 105(f) of STAA, § 106(c) of STURAA, the regulations promulgated thereunder and the contract provisions promulgated pursuant to STAA, STURAA and the regulations are facially unconstitutional;

2. Entry of judgment declaring that § 105(f) of STAA, § 106(c) of STURAA, the regulations promulgated thereunder and the contract provisions promulgated pursuant to STAA, STURAA and the regulations, are unconstitutional as they are applied and thus deprive Plaintiff of rights secured by the Constitution and Laws of the United States;

3. Entry of judgment declaring that the Federal highway program administered by the Central Federal Lands Highway Division violates the rights of Plaintiff under the Constitution of the United States;

4. Entry of Judgment permanently enjoining Defendants from discriminating in the future on the basis of gender, race, sex or national origin in the administration of federal highway contracts;

5. Entry of Judgment awarding costs and attorneys fees to Plaintiff pursuant to 42 U.S.C. § 1983; and

6. For such other and further relief as to the Court seems just and equitable in the premises.

JURY DEMAND

PLAINTIFF HEREBY DEMANDS THAT THE ISSUES IN THIS CASE BE TRIED BY A CIVIL JURY.

MOUNTAIN STATES LEGAL FOUNDATION

/s/ Gary N. Herbert
William Perry Pendley
Gary N. Herbert No. 004922
Todd S. Welch
1660 Lincoln Street
Suite 2300
Denver, Colorado 80264
(303) 861-0244

PLAINTIFF'S ADDRESS:
ADARAND CONSTRUCTORS, INC.
2720 East Las Vegas Street
Colorado Springs, Colorado 80906
(719) 390-4000

* * *

Section 108. – PROSECUTION AND PROGRESS

108.01 Subcontracting. This subsection is supplemented to include a Disadvantaged Business Enterprise (DBE) Development and Subcontracting Compensation Provision as follows:

Monetary compensation is offered for awarding subcontracts to small business concerns owned and controlled by socially and economically disadvantaged individuals. A DBE shall mean a small business concern owned and controlled by socially and economically disadvantaged individuals as defined under the FAR Contract Clause 52.219-8 entitled "Utilization of Small Business Concerns Owned and Controlled by Socially and Economically Disadvantaged Individuals" or a woman owned business as defined under FAR Contract Clause 52.219-13.

A small business concern will be considered a DBE after it has been certified as such by the U.S. Small Business Administration or any State Highway Agency. Certification by other Government agencies, counties, or cities may be acceptable on an individual basis provided the Contracting Officer has determined the certifying agency has an acceptable and viable DBE certification program. If the Contractor requests payment under this provision, the Contractor shall furnish the Engineer with acceptable evidence of the subcontractor(s) DBE certification and shall furnish one certified copy of the executed subcontract(s).

Compensation is provided to the Contractor to locate, train, utilize, assist, and develop DBE's to become fully qualified contractors in the transportation facilities construction field. The Contractor shall also provide direct assistance to disadvantaged subcontractors in acquiring necessary bonding, obtaining price quotations, analyzing plans and specifications, and planning and management of the work. The Contractor shall maintain records documenting these activities and shall make them available for Government review upon request.

If the DBE subcontractor subcontracts (2nd tier) all or part of its work to a non-DBE subcontractor, payment under this provision may be adjusted accordingly by the Engineer. The prime contractor may only receive compensation for that portion of subcontract work which is actually performed by DBEs. However, if the DBE subcontractor subcontracts only insignificant portions of the subcontract while still doing the major portion of the work, the prime contractor may receive full compensation under this provision.

For each subcontract, the subcontracted work, except for purchased materials, must be performed at the project site, and, except for engineering services, the labor associated with that work must be subject to the Labor Standards Provisions of the contract.

The Contractor will become eligible to receive payment under this subcontracting compensation provision when the dollar amount (based on final subcontracted amount) of the disadvantaged business enterprise subcontract(s) awarded exceeds 10 percent of the original contract amount.

The Contractor will be paid an amount computed as follows:

1. If a subcontract is awarded to one DBE, 10 percent of the final amount of the approved DBE subcontract, not to exceed 1.5 percent of the original contract amount.

2. If subcontracts are awarded to two or more DBEs, 10 percent of the final amount of the approved DBE subcontracts, not to exceed 2 percent of the original contract amount.

Payment will be made as follows:

1. Fifty percent of the computed amount (based on original subcontract amount) will be paid when the DBE subcontractor(s) commences work on the project.

2. The remainder of the computed amount (based on the final subcontract amount) will be paid when the DBE subcontractor(s) has satisfactorily completed all subcontract work.

This payment will be full compensation for locating, selecting, training, and assisting DBE subcontractors; for maintaining supporting records; and for supplying all facilities and services to complete this DBE subcontracting provision.

Upon completion of the subcontract work, the Contractor shall furnish a certified copy of acceptable records supporting the final amount(s) paid to or on behalf of the DBE subcontractor(s).

Item 108(2) of the bid schedule provides an estimated contingent sum amount to cover the cost of this provision.

108.04 Limitation of Operations. Add the following:

The Contractor is restricted from working in the following areas until right-of-way clearance is received by the Government:

1. Station 257+00 to Station 299+00
2. Station 555+00 to Station 570+00

Right-of-way clearance is expected by March 1, 1990.

The Contractor shall limit the hours of construction activities within 1,000 feet of occupied residences to between 6 a.m. and 10 p.m. daily.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 90-1413

ADARAND CONSTRUCTORS, INC.,
a Colorado Corporation,

Plaintiff,

v.

SAMUEL K. SKINNER, Secretary of the Department of Transportation, ROBERT E. FARRIS, Administrator of the Federal Highway Administration, LOUIS N. MACDONALD, Administrator of Region VIII and JERRY BUDWIG, Division Engineer of The Central Federal Land Highway Division,

Defendants.

DECLARATION OF
STARLING J.T. PROFFIT

STARLING J.T. PROFFIT makes the following statement pursuant to 28 U.S.C. §1746:

1. That he makes this statement in support of the Motion For Summary Judgment filed by the Plaintiff herein.

2. That he is the Chief Estimator for MOUNTAIN GRAVEL & CONSTRUCTION COMPANY and has held that position for five (5) years.

3. That he is familiar with plaintiff ADARAND CONSTRUCTORS, INC., and has known plaintiff for approximately four (4) years.

4. That ADARAND CONSTRUCTORS, INC., has a good reputation in the highway construction industry for quality performance at reasonable prices.

5. That MOUNTAIN GRAVEL & CONSTRUCTION COMPANY was the prime contractor on Project No. CO FH 60-2(2), West Delores, Delores County, Colorado, which was let by the Central Federal Lands Highway Division of the Federal Highway Administration.

6. That MOUNTAIN GRAVEL & CONSTRUCTION COMPANY is familiar with the contract provisions and bid specifications on Project No. CO FH 60-2(2), West Delores, Delores County, Colorado, which was let by the Central Federal Lands Highway Division of the Federal Highway Administration, including the Disadvantaged Business Enterprises (DBE) provisions, which pay a prime contractor a "bonus" if the prime contractor uses DBE's for at least 10% of the total contract let by Central Federal Lands Highway Division of the Federal Highway Administration.

7. That MOUNTAIN GRAVEL & CONSTRUCTION COMPANY knew that it would receive a "bonus" on Project No. CO FH 60-2(2), West Delores, Delores County, Colorado, which was let by the Central Federal Lands Highway Division of the Federal Highway Administration if it subcontracted at least 10% of the contract with one or more DBEs.

8. That ADARAND CONSTRUCTORS, INC., submitted a bid to MOUNTAIN GRAVEL & CONSTRUCTION COMPANY to perform the guardrail construction work on Project No. CO FH 60-2(2), West Delores, Delores County, Colorado, which was let by the Central Federal Lands Highway Division of the Federal Highway Administration.

9. That bid submitted by ADARAND CONSTRUCTORS, INC., was the lowest bid of all bids received by MOUNTAIN GRAVEL & CONSTRUCTION COMPANY for the guardrail work on Project No. CO FH 60-2(2), West Delores, Delores County, Colorado, which was let by the Central Federal Lands Highway Division of the Federal Highway Administration.

10. That because of the contract provisions which give a bonus to prime contractors in order to encourage the use of DBEs on Federal Highway Projects, MOUNTAIN GRAVEL & CONSTRUCTION COMPANY felt compelled to give the subcontract for the guardrail work to Gonzales Construction, as well as subcontract to other qualified DBE construction firms.

11. That the primary reason that MOUNTAIN GRAVEL & CONSTRUCTION COMPANY gave the subcontract for the guardrail to Gonzales Construction, a qualified DBE, is because Gonzales Construction is a DBE and MOUNTAIN GRAVEL & CONSTRUCTION COMPANY felt economically compelled to award its subcontract to a DBE and because MOUNTAIN GRAVEL & CONSTRUCTION COMPANY was entitled to a bonus of approximately $10,000.00 for awarding the subcontract to Gonzales Construction, a qualified DBE.

12. That but for the requirements of the Federal Highway contracts which encourage prime constractors [sic] to use DBEs, MOUNTAIN GRAVEL & CONSTRUCTION COMPANY would have accepted the low bid submitted by ADARAND CONSTRUCTORS, INC., and awarded the subcontract to ADARAND CONSTRUCTORS, INC.

I declare under penalty of perjury that the foregoing is true and correct. Executed on this 12th day April, 1991.

/s/ Starling J. T. Proffit
STARLING J. T. PROFFIT

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 90-1413

ADARAND CONSTRUCTORS, INC.,
a Colorado Corporation,

Plaintiff,

v.

SAMUEL K. SKINNER, Secretary of the Department of Transportation, ROBERT E. FARRIS, Administrator of the Federal Highway Administration, LOUIS N. MACDONALD, Administrator of Region VIII and JERRY BUDWIG, Divisior. Engineer of The Central Federal Land Highway Division,

Defendants.

DECLARATION OF RANDY MARK PECH

RANDY MARK PECH makes the following declaration pursuant to 28 U.S.C. §1746:

1. That he makes this declaration in support of the Motion For Summary Judgment filed by the Plaintiff herein.

2. That he is a white male and is currently General Manager of Plaintiff ADARAND CONSTRUCTOR, INC. and has held that position for 3 years. Previous to becoming General Manager he served as President since 1976.

ADARAND CONSTRUCTORS, INC. specializes in guardrail installation and is precertified by the State of Colorado to perform guardrail installation. The installation of guardrail requires specialized training, experience and equipment. ADARAND CONSTRUCTORS, INC. has the training, equipment and expertise to perform the specialty subcontract work of installing guardrail.

3. That ADARAND CONSTRUCTORS, INC. is not a DBE firm certified by the State of Colorado or any other governmental entity and is not entitled to receive the benefits conferred on DBEs by the Central Federal Lands Highway Division.

4. As General Manager he is responsible for the general, day to day operations of Plaintiff. That his duties include, overseeing all of the financial decisions of the company, developing company procedures and policies, check all of the bookkeeping work, some estimating, developing the estimating programs and tracking historical data for the estimators, and handles the bank and insurance negotiations.

5. That ADARAND CONSTRUCTORS, INC., has a good reputation in the highway construction industry for quality performance at reasonable prices.

6. That MOUNTAIN GRAVEL & CONSTRUCTION COMPANY was the prime contractor on Project No. CO FH 60-2(2), West Delores, Delores County, Colorado, which was let by the Central Federal Lands Highway Division on the Federal Highway Administration.

7. That ADARAND CONSTRUCTORS, INC., submitted a bid to MOUNTAIN GRAVEL & CONSTRUCTION COMPANY to perform the guardrail construction work on Project No. CO FH 60-2(2), West Delores, Delores County, Colorado, which was let by the Central Federal Lands Highway Division of the Federal Highway Administration.

8. That he understands that the bid submitted by ADARAND CONSTRUCTORS, INC., was the lowest responsible bid of all bids received by MOUNTAIN GRAVEL & CONSTRUCTION COMPANY for the guardrail work on Project No. CO FH 60-2(2), West Delores, Delores County, Colorado, which was let by the Central Federal Lands Highway Division of the Federal Highway Administration.

9. That the bid submitted by ADARAND CONSTRUCTORS, INC. on the West Delores project for guardrail and related items was $104,800.

10. That as a result of not receiving the bid on the West Delores project ADARAND CONSTRUCTORS, INC. was unable to realize a profit of approximately $20,000.

11. That he contacted the state highway departments for the States of Colorado, Nevada, Utah, Wyoming, New Mexico, Arizona and Idaho and obtained the publications of those States that set forth the number of Certified DBE contractors in each of those States and the number of prequalified Non-DBE contractors. That he personally counted the number of DBEs and prequalified Non-DBEs in each state. That the number of DBEs and prequalified Non-DBEs in each States is as follows:

	DBE Contractors	Prequalified Non-DBE Contractors
Colorado	211	145
Nevada	140	231
Utah	65	166
Wyoming	54	308
New Mexico	193	
Arizona	160	270
Idaho	91	

The States designated with an * did not provide information on Non-DBE contractors.

12. That at various times ADARAND CONSTRUCTORS, INC. has been a prime contractor on jobs in Colorado.

13. That he views the DBE provisions of the contract – which pay a "bonus" for use of DBEs on highway construction and require large business concerns to prepare a subcontracting plan showing the proposed use of DBEs – as a requirement that they must meet or they may lose the contract. Rather than take the chance that they will lose the bid once they have obtained it, they will use the DBEs even if a lower bid is received from a Non-DBE.

14. That because a prime contractor is required to perform 50% or more of the contracted work, a large percentage of the subcontracted work is in the specialty area, including guardrail, which puts an undue burden on non-DBE companies that work only in the specialty areas.

15. That he has read the Contract which is the subject matter of this action and is attached to the Motion for

Summary Judgment as Exhibit A and he has not found a specific provision of the Contract which provides that a prime contractor does not have to participate in the Subcontracting Compensation Clause program.

I declare under penalty of perjury that the foregoing is true and correct. Executed on this 18th day of April, 1991.

/s/ Randy M Pech
RANDY MARK PECH

Supreme Court, U.S.
FILED
NOV 7 1994
OFFICE OF THE CLERK

No. 93-1841

In The

Supreme Court of the United States

October Term, 1994

ADARAND CONSTRUCTORS, INC.,

Petitioner,

v.

FEDERICO PENA, Secretary of Department of Transportation; THOMAS D. LARSEN, Administrator of the Federal Highway Administration; LOUIS N. MACDONALD, Administrator Region VIII of the Federal Highway Administration; and JERRY BUDWIG, Division Engineer of the Central Federal Lands Highway Division,

Respondents.

On Writ Of Certiorari
To The United States Court of Appeals
For The Tenth Circuit

PETITIONER'S BRIEF

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ISSUES PRESENTED

1. Whether, in an as applied challenge, a congressional race-conscious set-aside program for awarding highway construction contracts survives constitutional scrutiny when that program seeks to remedy alleged broad-based societal discrimination, rather than clearly identifiable discrimination perpetuated by the governmental entity seeking to remedy the discrimination?

2. Whether "strict scrutiny," as opposed to "a lenient standard, resembling intermediate scrutiny," is the proper standard of review for determining the constitutionality of a race-conscious program adopted by Congress?

3. Whether the Fifth Amendment requires a federal agency, in implementing a federal race-conscious, set-aside program and when exceeding the goals adopted by Congress, to conduct the inquiry set forth in *City of Richmond v. J.A. Croson, Co.*, 488 U.S. 469 (1989)?

LIST OF PARTIES

Adarand Constructors, Inc. (Adarand) was Plaintiff in the United States District Court for the District of Colorado and Appellant before the United States Court of Appeals for the Tenth Circuit. Adarand is a corporation organized under the laws of the State of Colorado. Adarand has no parent or subsidiary corporations.

The following were Defendants in the United States District Court for the District of Colorado and Appellees before the United States Court of Appeals for the Tenth Circuit: Samuel K. Skinner, in his official capacity as Secretary of the Department of Transportation (Mr. Skinner has since been replaced in his official capacity by Federico Pena); Robert E. Farris, in his official capacity as Administrator of the Federal Highway Administration (Mr. Farris has since been replaced in his official capacity by Thomas D. Larsen); Louis N. MacDonald, in his official capacity as Administrator of Region VIII of the Federal Highway Administration; and Jerry Budwig, in his official capacity as Division Engineer of the Central Federal Lands Highway Division.

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OPINIONS BELOW

Review is sought of the opinion of the United States Court of Appeals for the Tenth Circuit, dated February 16, 1994, reported as *Adarand Constructors, Inc. v. Pena*, 16 F.3d 1537 (10th Cir. 1994) and reproduced at pages 1 to 26 of the Appendix to The Petition for *Writ* of *Certiorari* (App.). The opinion and order of the District Court, dated April 21, 1992, *Adarand Constructors, Inc. v. Skinner*, 790 F. Supp. 240 (D.Colo. 1992), are reproduced at App. 26 to 38.

JURISDICTION

The United States Court of Appeals for the Tenth Circuit entered judgment against Petitioner on February 16, 1994. (R. 10th Cir. # 26.)[1] The petition for *writ* of *certiorari* was filed on May 17, 1994. (R. 10th Cir. # 29.) The *writ* of *certiorari* was granted on September 26, 1994. (R. 10th Cir. # 31.)

The Supreme Court has jurisdiction to review this opinion pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Petitioner's challenge is based upon the Equal Protection component of the Due Process Clause of the Fifth Amendment to the United States Constitution. The Fifth

---

[1] The Joint Appendix is designated as J.A. The Appendix to Petition for *writ* of *certiorari* is designated as "App." The record from the Tenth Circuit Court of Appeals is designated "R. 10th Cir. #," with the docket number and pages identified. The record from the United States District Court for the District of Colorado is designated "R. Colo. #," with the docket number and pages identified.

Amendment provides, in pertinent part: "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . . "

Respondents maintain that the challenged agency action is authorized by § 502 of the Small Business Act, (SBA) 15 U.S.C. § 644(g). (App. at 39-40.) The SBA, which applies to all federal procurement activities, requires the President to set an annual "goal" of not less than 5% for small businesses owned and controlled by "socially and economically disadvantaged individuals." 15 U.S.C. § 644(g)(1). The statute then states, in pertinent part:

> Notwithstanding the Government-wide goal, each agency shall have an annual goal that presents, for that agency, the maximum practicable opportunity for . . . small business concerns owned and controlled by socially and economically disadvantaged individuals to participate in the performance of contracts let by such agency.

Id. The phrase "socially disadvantaged individuals" is defined as:

> Socially disadvantaged individuals are those who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities.

15 U.S.C. § 637(a)(5). The phrase "economically disadvantaged individuals" is defined as:

> Economically disadvantaged are those socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged.

15 U.S.C. § 637(a)(6). Moreover, racial minorities are "presume[d]" to be "socially and economically disadvantaged":

> As used in this contract, the term "small business concern" shall mean a small business as defined pursuant to section 3 of the Small Business Act and relevant regulations promulgated pursuant thereto. The term "small business concern owned and controlled by socially and economically disadvantaged individuals" shall mean a small business concern –
>
> (i) which is at least 51 per centum owned by one or more socially and economically disadvantaged individuals; or, in the case of any publicly owned business, at least 51 per centum of the stock of which is owned by one or more socially and economically disadvantaged individuals; and
>
> (ii) whose management and daily business operations are controlled by one or more of such individuals.
>
> The contractor shall presume that socially and economically disadvantaged individuals include Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities, or any other individual found to be disadvantaged by the Administration pursuant to section 8(a) of the Small Business Act.

15 U.S.C. § 637(d)(3)(C).

Funding for the project at issue in this case was provided by § 106 of the Surface Transportation and

Uniform Relocation Assistance Act of 1987 (STURAA) which provides, in pertinent part:

> (a) FROM THE HIGHWAY TRUST FUND. – For the purpose of carrying out the provisions of title 23, United States Code, the following sums are hereby authorized to be appropriated . . . :
>
> * * *
>
> (8) FOREST HIGHWAYS. – For forest highways $55,000,000 per fiscal year for each of fiscal years 1987, 1988, 1989, 1990, and 1991.
>
> (c) DISADVANTAGED BUSINESS ENTERPRISES. –
>
> (1) GENERAL RULE. – Except to the extent that the Secretary determines otherwise, not less than 10 percent of the amounts authorized to be appropriated under titles I and III of this Act or obligated under titles I, II, and III (other than section 203) of the Surface Transportation Assistance Act of 1982 after the date of the enactment of this Act shall be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals.
>
> (2) DEFINITIONS. – For purposes of this subsection –
>
> (A) SMALL BUSINESS CONCERN. – The term "small business concern" has the meaning such term has under section 3 of the Small Business Act (15 U.S.C. 632); except that such term shall not include any concern or group of concerns controlled by

> the same socially and economically disadvantaged individual or individuals which has average annual gross receipts over the preceding 3 fiscal years in excess of $14,000,000, as adjusted by the Secretary for inflation.
>
> (B) SOCIALLY AND ECONOMICALLY DISADVANTAGED INDIVIDUALS. – The term "socially and economically disadvantaged individuals" has the meaning such term has under section 8(d) of the Small Business Act (15 U.S.C. 637(d)) and relevant subcontracting regulations promulgated pursuant thereto . . . .

Pub. L. 100-17, 101 Stat. 144-46 (1987), §§ 106(a) and (c).

STATEMENT OF THE CASE

A. Facts and Background

This case presents a challenge to a federal program, hereinafter "the Federal Construction Procurement Program," authorized by § 502 of the Small Business Act, 15 U.S.C. § 644(g), and funded by § 106(a)(8) of the Surface Transportation and Uniform Relocation Assistance Act of 1987 (STURAA), Pub. L. 100-17, 101 Stat. 132 (1987). The Federal Construction Procurement Program, which is funded by STURAA and which Respondents maintain is authorized by § 502 of the SBA [15 U.S.C. § 644(g)], provides the authority for a provision included in highway construction contracts by the Central Federal Lands Highway Division (CFLHD) entitled the "Subcontracting

Compensation Clause" (SCC).[2] The SCC is quoted in its entirety in the Joint Appendix at pages 24-27. Although Adarand does not challenge the constitutionality of STURAA, Adarand does challenge the constitutionality of § 106(c) of STURAA since it is that provision that incorporates by reference 15 U.S.C. § 637(d) of the SBA and thereby provides the "presumption" that listed minorities are "disadvantaged." The SCC is designated as § 108 of all sealed bids for highway construction contracts issued by the CFLHD.[3] (J.A. 24-27).

As a contracting agency within the FHWA, the CFLHD is apportioned a share of the FHWA's annual goal for small "disadvantaged" business participation. (R. 10th Cir. # 11, Aplt. App. 349-350.) The small disadvantaged business goal established by the FHWA for the CFLHD was between 12% and 15% of the approximately $40 million in funding that the CFLHD receives annually for its highway construction projects. (R. 10th Cir. # 11, Aplt. App. 347.) The CFLHD uses three means to achieve its share of the goal: (1) awarding contracts to small "disadvantaged" businesses by competitive bid; (2) awarding contracts to the Small Business Administration under the section 8(a) program, 15 U.S.C. § 637(a), which then allocates the contracts to "disadvantaged" firms

---

[2] The CFLHD is a regional subsidiary of the Federal Lands Highway Program (FLHP). The FLHP is subordinate to the Federal Highway Administration (FHWA), which is, in turn, part of the U.S. Department of Transportation (DOT).

[3] "[T]he [SCC] clause is included in all sealed bidding contracts, it is not included in the 8(a) contracts. . . . [Because the 8(a) contracts go exclusively to Disadvantaged Business Enterprises], we do not put the SCC into those contracts." (R. 10th Cir. # 14, DOT App. 74-75.)

only; and (3) encouraging firms, by means of financial incentives, that win prime contracts to award subcontracts to "disadvantaged" firms.[4] It is the third mechanism that is at issue in this case. The CFLHD required the inclusion of the SCC provision in its sealed bid contracts as a means of achieving the goals established pursuant to 15 U.S.C. § 644(g). (R. 10th Cir. # 11, Aplt. App. 316-317 & Aplt. App. 342.)[5]

Adarand Constructors, Inc., (Adarand) is a highway construction company that specializes in the installation of highway guardrail systems and highway signs. Adarand has been engaged continuously in this business since 1976 and has substantial expertise in the performance of these tasks. (J.A. 33.) Adarand is not eligible for a presumption that it qualifies for certification as a "Disadvantaged Business Enterprise" under the SBA because its "management and daily business operations are controlled by" Randy Pech, who is a white male. (J.A. 32.) 15 U.S.C. § 637(d)(3)(C).

The function of the CFLHD is to supervise the construction and maintenance of highways on federally-

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[4] (R. 10th Cir. # 11, Aplt. App. 316-317; Aplt. App. 342; Aplt. App. 345-346.)

[5] At the end of each fiscal year, federal agencies, including DOT, submit reports to the Small Business Administration on the extent of federal procurement contracting participation by small businesses and DBEs, including an explanation of any failure to meet the agency-wide goal. 15 U.S.C. § 644(h). The reports are compiled by the Small Business Administration and submitted to the President and Congress. *Id.*

owned lands within its geographic region.[6] The CFLHD does not certify businesses as Disadvantaged Business Enterprises.[7] Rather, it relies on the states and the Small Business Administration to provide that certification.

On August 10, 1989, the CFLHD issued a solicitation for bids for the construction of a 4.7 mile section of highway located in the San Juan National Forest (the West Dolores Project). (R. 10th Cir. # 11, Aplt. App. 103-312.) The West Dolores Project is located approximately 400 miles from Denver in the extreme southwestern corner of Colorado in Montezuma and Dolores Counties near the Four Corners Area. The construction site is located hundreds of miles from Salt Lake City, Utah; Albuquerque, New Mexico; and Phoenix, Arizona. Furthermore, both counties in which this project took place are sparsely populated: 10.05 and 1.34 people per square mile, respectively.[8]

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[6] The geographic region of the CFLHD includes all or part of the following states: Colorado, Nebraska, North Dakota, California, Wyoming, Utah, Arizona, New Mexico, Texas, South Dakota, Nevada, Kansas, and Hawaii. (R. 10th Cir. # 11, Aplt. App. 319-320.)

[7] The CFLHD accepts, as a DBE, any entity certified as such by a "state or the Small Business Administration." (R. 10th Cir. # 14, DOT App. 44-45; DOT App. 104; and R. 10th Cir. # 11, Aplt. App. 315). "[T]he type of proof of social disadvantage accepted by CFLHD for purposes of its SCC provision is that type of proof required for certification of small business concerns by SBA for the 8(a) program, 15 U.S.C. § 637(a), set out in 13 C.F.R. § 124.105, and by state highway agencies for Department of Transportation programs pursuant to the standards of 49 C.F.R. §§ 23.51, 23.53 and subpart D, Appendix C." (R. 10th Cir. # 11, Aplt. App. 315)

[8] *Colorado Population Counts and Estimates, 1980-1983*, Published by the Colorado Division of Local Government.

Section 108 of the contract for the West Dolores Project was the SCC provision. (J.A. 24-27.) The SCC offered a monetary reward to all prime contractors who would hire "disadvantaged" subcontractors to perform work constituting more than 10% of the overall contract amount.[9] (J.A. 25.) The SCC was based on a uniform version of the same which was issued by the Administrator of the FLHP in 1981 and is used in all three regions of the FLHP. (R. 10th Cir. # 11, Aplt. App. 326-327.)

The term "disadvantaged business enterprise" (DBE) is presumed to include all small businesses owned and operated by Blacks, Hispanics, Asians, Native Americans, and "other minorities".[10] (48 C.F.R. § 52.219-8; 13 C.F.R. § 124.105(b)[11]; R. 10th Cir. # 11, Aplt. App. 286.) Businesses owned or operated by white men are not presumed to be "disadvantaged."

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[9] The CFLHD requires that at least 10% of the cost of the contract be awarded to one or more DBEs before a prime contractor is entitled to the bonus under the SCC. (R. 10th Cir. # 14, DOT App. 52-53). The 10% minimum is taken from the percentage required by Section 105(f) of the Surface Transportation Assistance Act, (STAA) Pub. L. 97-424, 96 Stat. 2100, and Section 106(c) of STURAA Pub. L. 100-17, 101 Stat. 145-46. (R. 10th Cir. # 14, DOT App. 103).

[10] For a highway construction company to qualify as a "small business," it may not have annual receipts that exceed $17 million. 13 C.F.R. § 121.601 (SIC 1611-1629). This represents the $14 million figure under STURRA, cited on p.5, adjusted for inflation.

[11] The "other minorities" presumed by the Small Business Administration to be "disadvantaged, include, but are not limited to, persons with origins in: Burma, Singapore, Laos, Republic of the Marshall Islands, Federated States of Micronesia, Fiji, Kiribati, Sri Lanka, and Bhutan.

The size of the bonus offered to the prime contractor under the SCC provision was equal to 10% of the final amount of the DBE subcontracts, not to exceed 2% of the final prime contract amount (1.5% if the prime contractor only contracts with one DBE subcontractor). (R. 10th Cir. # 11, Aplt. App. 286.) Moreover, the CFLHD required prospective prime contractors to include in their bids an amount for compensation under the SCC program regardless of whether the prime contractors intended to collect the bonus.[12] Thus, a prime contractor could not gain an advantage in the competition to submit the lowest-priced bid by agreeing to forego the benefits available under the SCC provision.[13] (R. 10th Cir. # 11, Aplt. App. 349.)

On September 15, 1989, the CFLHD awarded the prime contract for the West Dolores Project to Mountain Gravel & Construction Company (Mountain Gravel). (R. 10th Cir. # 11, Aplt. App. 114.) Shortly thereafter, Adarand submitted a bid to Mountain Gravel seeking to subcontract the guardrail portion of the highway construction project. (J.A. 30 & 34.) Adarand's bid quoted a lower price for the work than any other bid. (J.A. 30 & 34.) However, because of the SCC, Mountain Gravel "felt compelled to give the subcontract of the guardrail work

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[12] In this case the bonus to be included in each prime contractor's bid was $30,000.00. (R. 10th Cir. # 11, Aplt. App. 118.)

[13] The CFLHD selects the lowest responsive bid for all projects under the sealed bidding process. (R. 10th Cir. # 14, DOT App. 81). The selected prime contractor must report all DBE and non-DBE subcontracts to the CFLHD. (R. 10th Cir. # 14, DOT App. 105-106). The CFLHD includes this information in a monthly report. (R. 10th Cir. # 14, DOT App. 37).

to Gonzales Construction." (J.A. 30.) Thus, the uncontroverted evidence is that:

> the primary reason that MOUNTAIN GRAVEL & CONSTRUCTION COMPANY gave the subcontract for the guardrail to Gonzales Construction, a qualified DBE, is because Gonzales Construction is a DBE and MOUNTAIN GRAVEL & CONSTRUCTION COMPANY felt economically compelled to award its subcontract to a DBE because MOUNTAIN GRAVEL & CONSTRUCTION COMPANY was entitled to a bonus of approximately $10,000.00 for awarding the subcontract to Gonzales Construction, a qualified DBE.
>
> [B]ut for the requirements of the Federal Highway contracts which encourage prime constractors (sic) to use DBEs, MOUNTAIN GRAVEL & CONSTRUCTION COMPANY would have accepted the low bid submitted by ADARAND CONSTRUCTORS, INC., and awarded the subcontract to ADARAND CONSTRUCTORS, INC.

(J.A. 30-31.)

B. Decisions Below

On August 10, 1990, Adarand filed an action in the United States District Court for the District of Colorado challenging the constitutionality of the use, by the CFLHD, of the contract provision referred to as the SCC, since the express purpose of the SCC is to induce prime contractors, on federal highway projects, to hire subcontractors based on the race of their owners, rather than the amount of their bids.

Cross Motions For Summary Judgment were filed on April 24, 1991. In Defendants' Brief in Support of Motion for Summary Judgment, Respondents argued that "here as in *Fullilove [v. Klutznick*, 448 U.S. 448 (1980)], Congress had abundant evidence from which it could conclude that minority businesses have been denied effective participation in public contracting opportunities by practices that perpetuated the effects of prior discrimination." (R. Colo. # 19, Brief 21.)

In their Memorandum in Opposition to Plaintiff's Motion for Summary Judgment and in Further Support of Defendants' Motion For Summary Judgment (Memorandum in Opposition), Respondents argued that the "compelling governmental interest" for the Federal Construction Procurement Program is set forth in the findings of Congress as follows:

> (1) With respect to the Administration's business development programs the Congress finds –
>
> (A) that the opportunity for full participation in our free enterprise system by socially and economically disadvantaged persons is essential if we are to obtain social and economic equality for such persons and improve the functioning of the national economy;
>
> (B) that many such persons are socially disadvantaged because of their identification as members of certain groups that have suffered the effects of discriminatory practices or similar invidious circumstances over which they have no control;

> (C) that such groups include, but are not limited to, Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans and other minorities;
>
> (D) that it is in the national interest to expeditiously ameliorate the conditions of socially and economically disadvantaged groups;
>
> (E) that such conditions can be improved by providing the maximum practicable opportunity for the development of small business concerns owned by members of socially and economically disadvantaged groups;
>
> (F) that such development can be materially advanced through the procurement by the United States of articles, equipment, supplies, services, materials, and construction work from such concerns; and
>
> (G) that such procurements also benefit the United States by encouraging the expansion of suppliers for such procurements, thereby encouraging competition among suppliers and promoting economy in such procurements.

15 U.S.C. § 631(f)(1). (R. Colo. # 36, Brief 6-7.)

In their Memorandum in Opposition, Respondents also stated:

> Clearly, Congress had available to it in 1978 the historical record of discrimination that the Supreme Court has found sufficient to support the preferences contained in the PWEA. . . . Because the use of the SCC is directly traceable

> to Congressional findings as to the need to remedy the historical underutilization of DBEs in Federal procurement, Congress has identified the compelling interest for its use.

(R. Colo. # 36, Brief 8-9.)

On April 21, 1992, the District Court issued an opinion and order denying Adarand's Motion For Summary Judgment and granting the United States' Motion For Summary Judgment.

On August 5, 1992, after obtaining an order granting a timely-filed Motion For Extension Of Time To File An Appeal, Adarand filed a Notice Of Appeal with the United States Court of Appeals for the Tenth Circuit.

Respondents filed with the United States Court of Appeals for the Tenth Circuit the following list of "evi- 15
dence" that Congress considered when it enacted U.S.C. § 644. The items listed were as follows:

> 133 Cong. Rec. 33321 (1987) (testimony of Cong. Mfume); 133 Cong. Rec. 33321-33322 (1987) (testimony of Cong. Meyers); 133 Cong. Rec. 33322 (1987) (testimony of Cong. Gallo); Minority Business Development Program Reform Act of 1987: Hearing Before the Senate Committee on Small Business, 100th Cong., 2d Sess. 109-110 (1988) (statement by Sen. D'Amato); *Id.* at 193-202 (statement by Sen. Levin); *Id.* at 8, 189-191 (statement by Sen. Kerry); *Id.* at 15-18 (statement by Sen. Sasser); 134 Cong. Rec. 31491-31492 (1988); 134 Cong. Rec. 30057 (1988); 133 Cong. Rec. 33314-33316 (1987) (testimony of Cong. LaFalce); The Small Business Competitiveness Demonstration Program Act of 1988: Hearings on S. 1559 Before the Senate Committee on Small Business, 100th Cong., 2d Sess.

> (1988); A bill to Reform the Capital Ownership Development Program: Hearings on H.R. 1807 Before the House Subcommittee on Procurement, Innovation, and Minority Enterprise Development, Committee on Small Business, 100th Cong., lst Sess. (1987); To Present and Examine the Result of a Survey of the Graduates of the Small Business Administration Section 8(a) Minority Business Development Program; Hearings Before the Senate Small Business Committee, 100th Cong., lst Sess. (1987); 134 Cong. Rec. 31493 (1988) (statement of Sen. Weiker); H. Conf. Rep. No. 1070, 100th Cong., 2nd Sess. 73 (1988), reprinted in 1988 U.S.C.C.A.N. 5401, 5507; 124 Cong. Rec. 29641 (1978) (testimony of Sen. Glenn); *id.* at 2944 (statement by Sen. Heinz); To Amend the Small Business Act to Extend the Current SBA 8(a) Pilot Program: Hearings on H.R. 5612 Before the Senate Select Committee on Small Business, 96th Cong., 2d Sess. (1980); Small and Minority Business in the Decade of the 1980's Pt. 1, House Committee on Small Business, 97th Cong., 1st Sess. (1981); see also Hearings on Minority Business and its Contributions to the U.S. Economy, Senate Committee on Small Business, 97th Cong. 2d Sess. (1982); *id.* at 10, 33-34, 65, 106, 114, 118, 120, 220, 221, 241; Small Business and the Federal Procurement System, Hearings Before the Subcommittee on General Oversight, House Committee on Small Business, 97th Cong., lst Sess. (1981); Hearings on Federal Contracting Opportunities for Minority and Women-Owned Businesses: An Examination of the 8(d) Subcontracting Program Before the Senate Committee on Small Business, 98th Cong., lst Sess. (1983); Hearings on Women Entrepreneurs: Their Success and Problems

> Before the Senate Committee on Small Business, 98th Cong., 2d Sess. (1984); Hearing on the State of Hispanic Small Business in America; Minority Enterprise and General Small Business Problems of the Committee on Small Business, 99th Cong., 2d Sess. (1986).

(R. 10th Cir. # 14, Brief 29-34.)

In an opinion dated February 16, 1994, *Adarand Constructors, Inc. v. Pena*, 16 F.3d 1537 (10th Cir. 1994), the United States Court of Appeals for the Tenth Circuit affirmed the decision of the District Court. The Tenth Circuit held:

> *Fullilove* controls. . . . [I]f Congress has expressly mandated a race-conscious program, a court must apply a lenient standard, resembling intermediate scrutiny, in assessing the program's constitutionality. (App. 15.)
>
> * * *
>
> If particularized findings to justify implementation of a federal remedial program are not required of a state . . . they clearly are not required of a federal agency, such as CFLHD, which Adarand concedes is obliged to administer the remedial program.[14]

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[14] The Tenth Circuit states: "The conclusion that CFLHD is acting with the bounds of the statutory authority of the Small Business Act is impelled by Adarand's own concession that the CFLHD's implementation of the SCC program was not beyond the agency's delegated power under section 502." (App. 21.) Adarand made no such concession. Adarand consistently argued, in its opening brief and its reply brief, that the SCC provision was beyond the mandate of Congress. (R. 10th Cir. # 11, Brief 16-28 and R. 10th Cir. # 17, Brief 3-9.)

> The lesson that we glean from *Fullilove* and *Croson* is that the federal government, acting under congressional authority, can engage more freely in affirmative action than states and localities. (App. 18.)
>
> * * *
>
> We also disagree with Adarand's argument that Congress must mandate precise percentage goals for minority small business participation. Such a position ignores the principle lesson of *Fullilove*. The splintered *Fullilove* Court did not uphold the challenged federal program *because* a specific percentage set-aside was mandated by Congress, but rather because the program, *in spite* of the racial and ethnic preference, satisfied equal protection requirements. (Emphasis in original.) (App. 21.)
>
> * * *
>
> Because Adarand stipulates that section 502 satisfies the evidentiary requirements of *Fullilove*, the only question to be resolved is whether the SCC program is narrowly tailored to achieve the remedial purpose of section 502. We hold that it does.[15] (App. 22.)

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[15] The statement that "Adarand stipulates" is a mischaracterization of Adarand's Reply Brief. The Brief states: "Adarand concedes, *for the sake of discussion*, that the evidence is sufficient to satisfy the evidentiary requirements of *Fullilove*. However this concession is not enough to save the Federal Defendants' argument." (App. 43.) (Emphasis added.) By adding the language "for the sake of discussion," Adarand was stating that for purposes of the discussion it could be assumed that the evidence met the requirements of *Fullilove*. This is much different from a stipulation. Adarand simply did not stipulate as indicated by the opinion of the Tenth Circuit.

* * *

> Having rejected Adarand's arguments, and having held that the district court did not err in relying on *Fullilove* rather than *Croson*, that accordingly, no *Croson* findings were necessary, and that the Small Business Act which authorized the SCC program meets the constitutional requirements, we affirm the district court's order of April 21, 1992, in favor of the Government. (App. 24.) (Internal citations have been omitted.)[16]

A Petition for *writ* of *certiorari* was filed on May 17, 1994. The *writ* of *certiorari* was granted on September 26, 1994.

SUMMARY OF ARGUMENT

When it adopted the Federal Construction Procurement Program at issue in this case, Congress selected race as the primary factor for the awarding of federal construction procurement contracts by the federal government. The use of race is the use of a classification that undermines the Constitution's guarantee of equal protection.

In considering the use of race by Congress regarding such matters as the issuance of federal construction contracts, this Court has traditionally used "the most rigid scrutiny" to determine whether Congress has violated the equal protection component of the Due Process Clause of

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[16] Although the Tenth Circuit Court of Appeals stated that the CFLHD was "not itself subject to the STURAA implementing regulations," the Court made no finding regarding the application of STURAA to this case. (App. 8.)

the Fifth Amendment. Regarding issues such as federal construction contracts, no decision of this Court has ever departed from the application of "strict scrutiny." While this Court has held that a lessor standard of review may apply when First Amendment issues are at stake, First Amendment issues are not involved in this case. Moreover, this Court has refused to impose a lesser duty on the federal government in meeting the Constitution's requirement for equal protection.

The application of "strict scrutiny" to the race-conscious Federal Construction Procurement Program requires that the federal government demonstrate both a "compelling governmental interest" for using race and that the means selected is "narrowly tailored." An examination of the federal government's alleged factual basis for adopting the race-conscious program reveals that it contains no evidence of a pattern or practice of discrimination; merely asserts what it purports to prove; and, at best, is an allegation of "societal discrimination." Thus, there is no evidence of a "compelling governmental interest."

The existence of the race-conscious Federal Construction Procurement Program for more than thirteen years, with no end in sight, demonstrates that it is not "narrowly tailored." Moreover, since the program is not linked to identified discrimination, it is impossible to assess whether the program is "narrowly tailored."

Even if "intermediate scrutiny" were the proper standard for reviewing the constitutionality of the race-conscious Federal Construction Procurement Program, and it is not, the program fails to survive. Even under the relaxed standard, Congress failed to provide "meaningful

evidence" that "actually comports with fact" to justify its use of race in awarding federal contracts. In addition, the means selected were not "substantially tailored" since "maximum practicable" permits the award of federal contracts far beyond that necessary to ameliorate past discrimination, that is, rising to 100 percent. This is especially the case since the race-conscious program has no logical stopping point.

The fact that it is a private individual who has made the decision to issue a subcontract on the basis of race is irrelevant since that individual is provided a financial inducement, under the race-conscious provisions of the Federal Construction Procurement Program, to engage in that conduct. The fact that this act is authorized by federal law and undertaken with federal funds makes it an action by the federal government.

While Congress may have had a basis for the adoption of a program authorizing the set-aside of 5 percent of government contracts on the basis of race, although Adarand disputes that it had such a basis, the decision by the CFLHD to adopt a program in which 12 to 15 percent of its contracting funds are apportioned on the basis of race is without the factual basis required by this Court. The CFLHD has demonstrated neither a "compelling governmental interest" for its decision nor that its program is "narrowly tailored."

ARGUMENT

I. THE FEDERAL CONSTRUCTION PROCUREMENT PROGRAM MAKES RACE THE DECIDING FACTOR IN THE AWARD OF MANY FEDERAL CONSTRUCTION SUBCONTRACTS.

The Federal Construction Procurement Program not only employs race as a factor, race is the primary factor

used to determine whether an enterprise is a DBE and, therefore, entitled to the preferential treatment accorded under the program implemented by the CFLHD.[17] That is, an individual is presumed to be "disadvantaged" if that individual is one of those listed. The Federal Construction Procurement Program does not define "disadvantaged" in "race-neutral terms," instead the program presumes that members of the listed races are "disadvantaged."

Thus, the payment of a monetary bonus to a prime contractor, in accordance with the SCC provision, turns upon the race of the subcontractor. The definition of "social and economic disadvantage" obviously favors racial minorities:

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[17] 15 U.S. C. § 644(g)(2)(B) specifically incorporates by reference § 8(a) [15 U.S.C. § 637(a)] of the SBA and makes no reference to section 8(d) [15 U.S.C. § 637(d)]. Section 8(d) is the provision that contains the "presumption" regarding race.

The SBA, over the history of the program and since the inclusion of § 8(d), has, however, treated § 8(a) and § 8(d) as interchangeable. In other words, the Small Business Administration, and other agencies that use the regulations promulgated by the Small Business Administration, including the Department of Transportation (DOT), have treated § 8(a) and § 8(d) as if the presumption applied to both. Congress has, over the years, had many opportunities to reverse this policy of the Small Business Administration and has failed to do so. Furthermore, the Justice Department has conceded that the SBA is race-conscious. (Opp. to Pet. 3.)

In any event, the funding for the West Dolores project was provided by § 106(a)(8) of STURAA and STURAA incorporates by reference the SBA's presumption under 15 U.S.C. § 637(d). Pub. L. 100-17, 101 Stat. 146, § 106(c).

> Socially disadvantaged individuals are those who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities.

15 U.S.C. § 637(a)(5). "Economically disadvantaged" means:

> those socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged.

15 U.S.C. § 637(a)(6).

Thus, only individuals who are "socially disadvantaged," that is, of certain specified racial and ethnic status can be "economically disadvantaged."[18] In addition, racial minorities, and only racial minorities, are entitled to a presumption of "disadvantage" as follows:

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[18] States or other governmental bodies receiving federal highway funds (recipients) must determine whether an entity is "disadvantaged." If the entity seeking certification is not a "minority" the governmental body looks no further; the entity is presumed not to be "disadvantaged." Economic data is not examined, other than to establish that the business is "small," that is, it has annual receipts of less than $17 million.

"Recipients should always make a determination of social disadvantage before proceeding to make a determination of economic disadvantage. *If the recipient determines that the individual is not socially disadvantaged, it is not necessary to make the economic disadvantage determination.*" 49 C.F.R. Pt. 23, Subpt. D, App. C. (Emphasis added.)

> The contractor shall presume that socially and economically disadvantaged individuals include Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities, or any other individual found to be disadvantaged by the Administration pursuant to section 8(a) of the Small Business Act.

15 U.S.C. § 637(d)(3)(C).

This Court has held that a racial classification is "a line drawn on the basis of race and[/or] ethnic status," *Regents of the University of California v. Bakke*, 438 U.S. 265, 289 (1978), and that the Constitution's guarantee of equal protection is violated if persons of different races "are not accorded the same protection." *Id.* (Emphasis added.) The Federal Construction Procurement Program is race-conscious. Under that program, a member of a listed minority group obtains DBE status merely by proving that individual's membership in one or more of the "presume[d]" disadvantaged minorities.[19] Once membership in one of the groups "presume[d]" to be disadvantaged is established, the individual is certified as a DBE.[20]

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[19] *See* 13 C.F.R. 124.105(b); and 48 C.F.R. § 52.219-8.

[20] "In making certification decisions, the recipient (state or local government) relies on this presumption, and does not investigate the social or economic status of individuals who fall into one of the presumptive groups." 49 C.F.R. Pt. 23, Subpt. D, App. A, at page 216 (10-1-92 Edition). This is the inverse of the situation described in footnote 18. That is, if the entity seeking certification is a "minority," the governmental body looks no further; the entity is presumed to be "disadvantaged." Economics is not examined, except to establish that the "business" is a "small business." *See* footnote 7 for an explanation of why the above cited regulations are applicable to this case.

Nothing else is required.[21] The Federal Construction Procurement Program is clearly race-conscious because it establishes classifications and draws lines on the basis of race or ethnic status.

II. STRICT SCRUTINY IS THE STANDARD OF REVIEW THIS COURT REQUIRES FOR A RACE-CONSCIOUS PROCUREMENT PROGRAM, INCLUDING ONE MANDATED BY CONGRESS.

The Federal Construction Procurement Program is race-conscious and, as such, is subject to strict scrutiny under the Equal Protection component of the Due Process Clause of the Fifth Amendment since "the reach of the equal protection guarantee of the Fifth Amendment is coextensive with that of the Fourteenth." *United States v. Paradise*, 480 U.S. 149, 166 n.16 (1987). This Court traditionally uses "the most rigid scrutiny" in considering violations of the equal protection component of the Due Process Clause of the Fifth Amendment. *Korematsu v.*

[21] Although the DBE status of a minority can be "rebutted," the burden to "rebut" the DBE status of an entity is placed on third parties. 49 C.F.R. § 23.69. Thus, the party challenging the DBE status of an entity must provide evidence that the challenged minority is not "socially and economically disadvantaged." The burden is on the wrong party. The party seeking to be benefitted by the program should have the burden of proving, not just his race or ethnic origins, but the nature of his "social" and/or "economic disadvantage." Moreover, the burden should be on the federal government to ensure that the benefits of a federal program are accruing to entities based upon their economic disadvantage, not just their race.

United States, 323 U.S. 214, 216 (1944).[22] "Most rigid scrutiny" is "strict scrutiny." In fact, Justice Marshall, in his concurring opinion in *Fullilove*, recognized that the "conventional" test for reviewing "governmental programs employing racial classifications" is "strict scrutiny." *Fullilove*, 448 U.S. at 519.

Nonetheless, the Tenth Circuit Court of Appeals applied a different and, therefore improper, standard of review to the race-conscious government contracting program challenged herein:

> [I]f Congress has expressly mandated a race-conscious program, a court must apply *a lenient standard, resembling intermediate scrutiny*, in assessing the program's constitutionality.

(App. 15.) (Emphasis added.) The United States Court of Appeals for the Tenth Circuit reached its conclusion by combining the *Fullilove* opinion authored by Chief Justice Burger with the concurring opinion in that case authored

[22] "[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect. It is not to say that all such restrictions are unconstitutional. It is to say that *courts must subject them to the most rigid scrutiny.*" *Korematsu v. United States*, 323 U.S. at 216. (Emphasis added.) *See also Bakke*, 438 U.S. at 299 (when decision-making touches upon an individual's race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear because of his race or ethnic background is precisely tailored to serve a compelling governmental interest); *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (the Equal Protection Clause demands that racial classifications be subjected to the "most rigid scrutiny"); and *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954) ("[c]lassifications based solely upon race must be scrutinized with particular care since they are contrary to our traditions and hence constitutionally suspect").

by Justice Marshall.[23] This holding of the Tenth Circuit is in error. A "lenient standard, resembling intermediate scrutiny" is not the standard of review for government contracting programs set forth by a majority of the justices in *Fullilove*, nor is it the standard set forth in other decisions of this Court.[24]

Although there is some question regarding whether Chief Justice Burger's opinion was based upon a "strict scrutiny" standard, he clearly required the use of a standard higher than intermediate scrutiny:

> We recognize the need for *careful judicial evaluation* to assure that any congressional program that employs racial or ethnic criteria to accomplish the objective of remedying the present effects of past discrimination is *narrowly tailored* to the achievement of that goal.

Fullilove, 448 U.S. at 480. (Emphasis added.) Furthermore, Chief Justice Burger wrote:

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[23] "A majority of the *Fullilove* Court agreed that strict scrutiny is not the proper test for evaluating a race-conscious remedial program authorized by an act of Congress." (App. 16, part of footnote 10.)

[24] The concurring opinion authored by Justice Marshall supports an "intermediate scrutiny" standard for the *Fullilove* factual situation because Justice Marshall rejects both "strict scrutiny" and "the minimally rigorous rational-basis standard of review." *Fullilove*, 448 U.S. at 519. The constitutional test is met, wrote Justice Marshall, when the program is "designed to further remedial purposes [which] serve important governmental objectives and are substantially related to achievement of those objectives." *Fullilove*, 448 U.S. at 519. But Justice Marshall was joined by only two other Justices, *i.e.* Justice Brennan and Justice Blackmun.

> *Any preference* based on racial or ethnic criteria must necessarily receive a *most searching examination* to make sure that it does not conflict with constitutional guarantees.

Fullilove, 448 U.S. at 491. (Emphasis added.) "Careful judicial evaluation," "narrow tailor[ing]" and "most searching examination" indicate a level of scrutiny much closer to "strict scrutiny" than to "intermediate scrutiny."

Chief Justice Burger articulated a two step analysis for reviewing the Public Works Employment Act (PWEA) program at issue in *Fullilove*. However, there is nothing in that analysis from which to infer that he intended any standard other than strict scrutiny. In fact, just the opposite is true as shown by the language quoted above and by the second step of Chief Justice Burger's analysis:

> the limited use of racial and ethnic criteria, in the context presented, is a constitutionally permissible *means* for achieving the congressional objectives and does not violate the equal protection component of the Due Process Clause of the Fifth Amendment.

Fullilove, 448 U.S. at 473. (Emphasis in original.)

Thus, the standard of review articulated by Chief Justice Burger in *Fullilove* was not, as interpreted by the Tenth Circuit, "a lenient standard, resembling intermediate scrutiny," but is the "conventional" "strict scrutiny" standard.[25]

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[25] The conclusion that Chief Justice Burger's standard of review is the conventional standard or strict scrutiny is bolstered by the concurring opinion of Justice Powell:

Therefore, the Tenth Circuit's opinion is in error when it holds "[a] majority of the *Fullilove* Court believed that an intermediate scrutiny analysis should be used to determine whether a congressionally-mandated program passes constitutional muster" and must be reversed. (App. 16, part of footnote 10).

III. THE DECISION OF THIS COURT IN *METRO BROADCASTING* IS NOT DISPOSITIVE OF THIS CASE.

The Tenth Circuit held that *Metro Broadcasting v. FCC*, 497 U.S. 547, 564 (1990):

> Although I would place greater emphasis than the Chief Justice on the need to articulate judicial standards of review in conventional terms, I view his opinion announcing the judgment as substantially in accord with my own views. Accordingly, I join that opinion and write separately to apply the analysis set forth by my opinion in *University of California Regents v. Bakke*, 438 U.S. 265 (1978).
>
> * * *
>
> [The PWEA] employs a racial classification that is constitutionally prohibited unless it is a necessary means of advancing a *compelling governmental interest*. (Citing *Bakke*) For the reasons stated in my *Bakke* opinion, I consider adherence to this standard as important and consistent with precedent.
>
> * * *
>
> Racial classifications must be assessed under *the most stringent level of review* . . . .

Fullilove, 448 U.S. at 496. (J. Powell, concurring.) (Emphasis added.) "Compelling governmental interest" and "the most stringent level of review" are "strict scrutiny."

> put to rest any lingering doubts about the continuing vitality of *Fullilove*: . . . "that race-conscious classifications adopted by Congress to address racial and ethnic discrimination are subject to a different standard than such classifications prescribed by state and local governments."

(App. 19.) The Tenth Circuit then concludes:

> the *Metro Broadcasting* majority held that even non-remedial race-conscious measures mandated by Congress are constitutionally permissible if they satisfy intermediate scrutiny.

(App. 19.)

Although this court held in *Metro Broadcasting* that "race-conscious classifications adopted by Congress to address racial and ethnic discrimination are subject to a different standard than such classifications prescribed by state and local governments" and that "intermediate scrutiny" is the proper standard of review, *Metro Broadcasting* involved a much different set of facts than the case at bar. *Metro Broadcasting*, 497 U.S. at 565-66. *Metro Broadcasting* involved concerns with the First Amendment:

> '[T]he people as a whole retain their interest in free speech by radio [and other forms of broadcast] and their collective right to have the medium function consistently with the ends and purposes of the First Amendment,' and '[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.'

Metro Broadcasting, 497 U.S. at 567.

The case at bar does not involve First Amendment concerns in any way. Although the need for "diversity" in certain areas, *i.e.*, broadcasting, police forces, and school

faculties and student bodies, as set forth in *Metro Broadcasting*, may provide "reasons for the classification," none of those situations exist in the case at bar. *Metro Broadcasting*, 497 U.S. at 601 (Stevens, J., concurring.) This case involves the erection of guardrails along a 4.7 mile section of national forest highway in an isolated and sparsely-populated region of southwestern Colorado. Moreover, Congress did not identify "diversity" in government contracting as a reason for the racial classifications used in the Federal Construction Procurement Program. *See* 15 U.S.C. § 631(f)(1). Thus, the holding of this Court in *Metro Broadcasting* is inapplicable to the case at bar.

Furthermore, Justice Stevens' concurring opinion in *Metro Broadcasting* cannot be cited as a basis for weakened scrutiny for programs that award government construction contracts on the basis of race since he demands that the reasons for racial classifications used in such programs be "clearly identified and unquestionably legitimate." *Metro Broadcasting v. FCC*, 497 U.S. at 601, citing his dissenting opinion in *Fullilove*. In his dissenting opinion in *Fullilove*, Justice Stevens wrote "[u]nless Congress clearly articulates the need and basis for a racial classification, and also tailors the classification to its justification, the Court should not uphold this kind of statute." *Fullilove*, 448 U.S. at 545 (Justice Stevens dissenting).[26]

While Justice Stevens listed several situations where race-conscious measures are "unquestionably legitimate,"

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[26] Regarding the SBA, Congress has done neither. It has not "clearly articulate[d] the need and basis for [the] racial classification" and has not "tailor[ed] the classification to its justification." "The Court should not uphold this . . . statute." *Fullilove*, 448 U.S. at 545 (Justice Stevens dissenting).

the list does not include highway construction or government contracts. *Metro Broadcasting*, 497 U.S. at 601-602.[27] Justice Stevens' decision not to include contracting as an "unquestionably legitimate" race-conscious measure and his dissent in *Fullilove* manifest his views that government contracting requires a different level of scrutiny than, for example, public broadcasting and that congressionally-mandated public works laws are subject to a more rigorous standard of review, *i.e.*, strict scrutiny.

As this Court has held on numerous occasions, strict scrutiny is the traditional standard of review to be applied to race-conscious programs like the one at issue, even if the program is mandated by Congress. The facts of the case at bar are clearly distinguishable from the facts found to require intermediate scrutiny in *Metro Broadcasting*. Since the decision of the Tenth Circuit is contrary to the decisions of this Court regarding the proper standard of review for race-conscious construction contract programs, the decision of the Tenth Circuit must be reversed.

IV. THE HOLDING OF THE TENTH CIRCUIT COURT OF APPEALS THAT CONGRESS "CAN ENGAGE MORE FREELY IN AFFIRMATIVE ACTION THAN STATES AND LOCALITIES" IS IN ERROR.

The Tenth Circuit held:

> The lesson that we glean from *Fullilove* and *Croson* is that the federal government, acting under congressional authority, can engage more

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[27] That list is "extremely narrow" and includes "broadcast diversity;" "an integrated police force;" "a public school faculty;" and "the student body of a professional school." *Metro Broadcasting*, 497 U.S. at 601-602.

> freely in affirmative action than states and localities.

(App. 18.) This holding deviates from the holdings of this Court:

> In view of our decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government.

Bolling v. Sharpe, 347 U.S. at 500.[28]

The holding of the Tenth Circuit with regard to the relationship of *Fullilove*, *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), and *Metro Broadcasting* is in error. Since none of the opinions written in *Fullilove* were a plurality, let alone a majority opinion, *Fullilove* cannot be read to overrule existing Supreme Court precedent.

As for *Metro Broadcasting*, its factual situation is clearly distinguishable from, and is not dispositive of, the case now before the Court. More importantly, *Metro Broadcasting* cannot be cited for the proposition that Congress is treated differently by the Constitution than other governmental bodies when a race-conscious construction contract program is at issue. The discussion of Congressional authority in *Croson*, as it related to the *Fullilove* decision, addressed Congressional power under § 5 of the Fourteenth Amendment, which is not at issue in this case.

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[28] "The Constitution's guarantee of equal protection binds the Federal Government as it does the States, and no lower level of scrutiny applies to the Federal Government's use of racial classifications." *Metro Broadcasting*, 497 U.S. at 604 (O'Connor, J. dissenting).

Croson, 488 U.S. at 490.[29] No decisions of this Court support the holding of the Tenth Circuit that "the federal government, acting under congressional authority, can engage more freely in affirmative action than states and localities" when a race-conscious construction program is at issue. Although Congress may have greater remedial authority, the constitutional standard for reviewing a construction contract program authorized by Congress or states is the same. The decision of the Tenth Circuit is in conflict with *Wygant v. Jackson Bd. of Education*, 476 U.S. 267, 275 (1986), *Croson*, *Bolling v. Sharpe*, and *Shaw v.Reno*, 509 U.S. ___, 125 L.Ed.2d 511, 526 (1993) and must be reversed.

V. THE RACE-CONSCIOUS FEDERAL CONSTRUCTION PROCUREMENT PROGRAM FAILS STRICT SCRUTINY AND IS UNCONSTITUTIONAL.

As indicated above, strict scrutiny is the standard of review that must be applied in this case. For the Federal Construction Procurement Program to survive strict scrutiny it must be "narrowly tailored" to a "compelling governmental interest." *See Shaw v. Reno*, 509 U.S. ___, 125 L.Ed.2d 511, 526.

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[29] Congress' § 5 authority is not implicated in this case since it involves a federal program implemented by a federal agency and since no state or local government is involved.

A. THERE IS NO "COMPELLING GOVERNMENTAL INTEREST" THAT JUSTIFIES THE FEDERAL CONSTRUCTION PROCUREMENT PROGRAM CHALLENGED IN THIS ACTION.

This Court has held that an attempt to remedy past discrimination is a "compelling governmental interest." Yet, Congress did not attempt to identify the discrimination to be remedied by this Federal Construction Procurement Program. As a result, the Federal Construction Procurement Program cannot survive strict scrutiny.

The record contains no evidence of any pattern or practice of discrimination against minorities in federal procurement activities. The racial preference codified at 15 U.S.C. § 644(g) appears as part of the Business Opportunity Development Reform Act of 1988, Pub. L. No. 100-656, 102 Stat. 3853 (1988).[30] This Act, which amended the SBA, focused almost exclusively on the section 8(a) set-aside program, 15 U.S.C. § 637(a). It contained no findings identifying the discrimination to be remedied by the provision being challenged in this case; indeed, it contained no findings identifying any discrimination at all. The legislative history is of no use in filling this gap; it, too, contains no evidence of a pattern or practice of discrimination against minorities in government procurement activities.[31]

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[30] The racial preference established by § 106 of STURAA was in effect for more than eleven years. STURAA was in force from 1987 through 1993, but the Surface Transportation Assistance Act of 1982, in which the language of § 105(f) was almost identical to the language of § 106(c) of STURAA, was in effect from 1982 to 1987. Pub. L. 97-424, 96 Stat. 2100.

[31] The legislative reports which accompanied Pub. L. 100-656 are reprinted at 1988 *U.S. Code Cong. & Admin. News* 5401 *et seq.*

At the trial court level, Respondents argued that "[i]n passing Public Law 95-507,[32] Congress made specific findings with respect to the utilization of socially and economically disadvantaged business concerns, as well as findings indicating the need to promote their participation in federal procurement." However, these "findings," which are codified at 15 U.S.C. § 631(f)(1) and set forth on pages 11-12, do not meet the Court's requirement for demonstration of a "compelling governmental interest."

The "findings" contain a statement of the reasons which caused Congress to adopt the racial preference provisions of the Federal Construction Procurement Program. However, they contain no evidence of a pattern or practice of discrimination in government contracting against members of "disadvantaged" ethnic groups. Rather, the "findings" merely assert what they purport to prove. Conclusory statements such as these "are of little probative value in establishing identified discrimination" in federal procurement. *Croson*, 488 U.S. at 501. Furthermore, the legislative history for Public Law 95-507 contains no empirical support for these "findings".[33] Therefore, these "findings" cannot be considered of value in determining whether the government has met its heavy burden of providing "extraordinary justification" for the racial classification in this case. (*See Shaw v. Reno*, 509 U.S. ___, 125 L.Ed.2d 511, 526, *citing Brown v. Board of Education*, "A

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[32] Pub. L. 95-507, styled as the Small Business Investment Act of 1978, also amended the SBA.

[33] The legislative reports which accompanied Pub. L. 95-507 are reprinted at 1978 *U.S. Code Cong. & Admin. News* 3835 *et seq.*

racial classification, regardless of its motivation, is presumptively invalid and can be upheld only upon an *extraordinary justification.*" (Emphasis added.))

In sum, Congress did not have persuasive evidence of a pattern or practice of intentional discrimination either by federal agencies or their prime construction contractors. Without such evidence of prior discrimination there is no "compelling governmental interest" that justifies the use of race in government decision-making. This shortcoming renders the Federal Construction Procurement Program constitutionally deficient under *Fullilove*, 448 U.S. at 480, as well as *Wygant*, 476 U.S. at 274 and *Croson*, 488 U.S. at 505. "[T]he statute [is] invalid because, on its face, it could not be explained on grounds other than race." *Shaw v. Reno*, 509 U.S. ___, 125 L.Ed.2d at 527.

Moreover, even if Congress made findings with the specificity this Court demands, and it did not, those findings were made more than a decade ago. If there was a pattern or practice of racial discrimination – and Respondents have testified there was not – the defect was cured long ago. Thus, what is present here is a remedy that is "ageless in [its] reach into the past, and timeless in [its] ability to affect the future." *Wygant*, 476 U.S. at 276.

Respondents admit that the CFLHD has never discriminated on the basis of race.[34] Respondents take the position that "societal discrimination" is sufficient to justify the use of a race-conscious program by that agency in

[34] In a deposition taken on March 19, 1991, Mr. Jerry Budwig, Division Engineer of the CFLHD testified "I would say that there has not been," when asked if there had ever been a case in which the CFLHD discriminated against a contractor or subcontractor on the basis of race. (App. 45-46.)

Colorado. However, this Court has held that "societal discrimination" is not enough: "This Court never has held that societal discrimination alone is sufficient to justify a racial classification." *Wygant*, 476 U.S. at 274. The reason is simple, "it is almost impossible to assess whether [this] plan is narrowly tailored to remedy prior discrimination since it is not linked to identified discrimination in any way." *Croson*, 488 U.S. at 498. Thus, "societal discrimination" cited by Congress does not provide sufficient constitutional authority to justify the use of a race-conscious program by federal officials in Colorado.

Despite the requirement of this Court for a showing of a "compelling governmental interest" before the use of race as a basis for governmental decision making, the United States Court of Appeals for the Tenth Circuit held that the "*significant governmental purpose* of providing subcontracting opportunities for small disadvantaged business enterprises" satisfies this Court's requirement. (App. 23.) (Emphasis added.) However, "significant governmental purpose" is not what this Court requires. This Court requires a "compelling governmental interest." No showing of a "compelling governmental interest" has ever been made by Congress for the race-conscious Federal Construction Procurement Program.

> [A] generalized assertion that there has been past discrimination in an entire industry provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy. It 'has no logical stopping point.'

Croson, 488 U.S. at 498. As a result, the decision of the United States Court of Appeals for the Tenth Circuit must be reversed.

B. THE FEDERAL CONSTRUCTION PROCUREMENT PROGRAM IS NOT "NARROWLY TAILORED."

The second prong of the strict scrutiny test is "narrow tailoring." That is, the race-conscious program must be "narrowly tailored" to meet the "compelling governmental interest" identified. *Shaw v. Reno*, 509 U.S. ___, 125 L. Ed. 2d at 526.

Yet, the Federal Construction Procurement Program is not narrowly tailored. Narrow tailoring requires that the race-conscious remedy "not last longer than the discriminatory effects it is designed to eliminate." *Fullilove*, 448 U.S. at 523 (Powell, concurring). Moreover, the Federal Construction Procurement Program must be "limited in extent and duration." *Fullilove*, 448 U.S. at 489. *See* also *Croson*, 488 U.S. at 498.

In finding the PWEA program challenged in *Fullilove* constitutional, Chief Justice Burger focused on the fact that the PWEA was "a short-term measure to alleviate the problem of national unemployment." *Fullilove*, 448 U.S. at 457.[35] Without a statutory provision establishing a limited time period for the use of the race-conscious remedy, the program cannot be said to be narrowly tailored. "Such

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[35] "The MBE provision may be viewed as a pilot project, appropriately limited in extent and duration. . . . " *Fullilove*, 448 U.S. at 489 (Opinion of Burger, C.J.) "The . . . set-aside is not a permanent part of federal contracting requirements. As soon as the PWEA program concludes, this set-aside program ends. The temporary nature of this remedy ensures that a race-conscious program will not last longer than the discriminatory effects it is designed to eliminate." *Fullilove*, 448 U.S. at 513 (Concurring opinion of Powell, J).

findings also serve to assure all citizens that the deviation from the norm of equal treatment of all racial and ethnic groups *is a temporary matter*, a measure taken in the service of the goal of equality itself." *Croson*, 488 U.S. at 510. (Emphasis added.)

The Federal Construction Procurement Program challenged here has been in place for more than thirteen years and shows no sign of ending in the foreseeable future.[36] (R. 10th Cir. # 11, Aplt. App. 326-327.) The law contains no automatic sunset provision and there is no reason to believe that the matter will be revisited by Congress in the near future, contrary to the view of the Tenth Circuit:

> [T]he SCC program is "appropriately limited in extent and duration" because federal procurement and construction contracting practices are subject to regular "reassessment and reevaluation by Congress."

(App. 23.) The Federal Construction Procurement Program is not a "short term measure" like the statute held by this Court in *Fullilove* to pass constitutional muster. *Fullilove*, 448 U.S. at 457. Nor is the Federal Construction Procurement Program supported by findings sufficient to "assure all citizens that the deviation from the norm of equal treatment of all racial and ethnic groups is a temporary matter," as required by *Croson*. *Croson*, 488 U.S. at 520. Here, without congressional action to repeal or amend it, the program will go on forever.

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[36] Mr. Budwig: "I'm not aware that [the Government's DBE program's] end is in sight." App. at 46-47. Not only does this program appear to be here to stay, but it represents hundreds of millions of federal dollars awarded solely on the basis of race.

A second aspect of narrow tailoring is that the program must be designed to remedy clearly identifiable discrimination. Yet, since Congress failed to identify the discrimination this program seeks to remedy, it suffers from the same deficiency Justice O'Connor identified in *Croson*:

> [I]t is almost impossible to assess whether the Richmond Plan is narrowly tailored to remedy prior discrimination since it is not linked to identified discrimination in any way.

Croson, 488 U.S. at 498.

"Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids." *Bakke*, 438 U.S. at 307. *See also Fullilove*, 448 U.S. at 497 (Powell, J., concurring) ("[I]f the set-aside merely expresses a congressional desire to prefer one racial or ethnic group over another, [it] violates the equal protection component in the Due Process Clause of the Fifth Amendment.")[37]

Yet, "preferring members of one group for no other reason than race" is precisely what Congress did in the Federal Construction Procurement Program. The Federal Construction Procurement Program directs federal agencies to set goals for minority participation at the "maximum practicable" level. 15 U.S.C. § 644(g). "Maximum

[37] Although this precept has never been the subject of a majority opinion, Adarand submits that this is because the precept is so readily apparent that it has never needed express statement.

practicable" has no reasonable limits. There is a limit to the persons who have suffered from discrimination, therefore, on its face, this near limitless preference cannot be tied to any legitimate remedial objective. Indeed, the goal's requirement has "no logical stopping point" other than the complete exclusion of all non-minority firms from government work. *Wygant*, 476 U.S. at 275 (1986). Instead, it is a race-conscious program that "prefer[s] one racial or ethnic group over another." *Fullilove*, 448 U.S. at 497 (Powell, J., concurring) This Congress cannot do.

Such an objective is invidious under any reading of the law. It sweeps far beyond the legitimate scope of race-conscious governmental action. Certainly, such a statute cannot be said to be "narrowly tailored" to a compelling governmental interest.

In sum, the race-conscious Federal Construction Procurement Program violates both prongs of the strict scrutiny standard. These violations render it unconstitutional.

VI. THE RACE-CONSCIOUS FEDERAL CONSTRUCTION PROCUREMENT PROGRAM IS UNCONSTITUTIONAL EVEN UNDER INTERMEDIATE SCRUTINY.

Respondents argue that intermediate scrutiny should be applied in this case. However, this argument suffers from two fatal flaws. First, as indicated above, it is simply incorrect; strict scrutiny is the proper standard of review for all race-conscious government construction contracting programs regardless of whether Congress has mandated the action. Second, the race-conscious Federal Construction Procurement Program is unconstitutional even under this relaxed standard of review.

Intermediate scrutiny requires that a statute be "related substantially" to the achievement of an "important public purpose." *Metro Broadcasting v. FCC*, 497 U.S. at 565. The desire to remedy past racial discrimination is unquestionably an important governmental purpose. Thus, the question in this case is whether the Federal Construction Procurement Program is "substantially related" to the achievement of this purpose.

The first step in the use of intermediate scrutiny is whether Congress possessed an adequate factual basis for the conclusion that members of groups favored by the Federal Construction Procurement Program have been subjected to racial discrimination. The quantum of evidence required to make this showing is not as high as under strict scrutiny.

However, the burden of persuasion remains on the proponent of the challenged classification. *Heckler v. Mathews*, 465 U.S. 728, 744 (1984); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982). Furthermore, conclusory assertions are not enough to carry this burden. *Lamprecht v. FCC*, 958 F. 2d 382, 393 (D.C. Cir. 1992), *quoting Craig v. Boren*, 429 U.S. 190, 208-209 (1976). Rather, the claim that a statute will substantially advance an important purpose must "at the very least be supported by meaningful evidence." *Lamprecht v. FCC*, 958 F. 2d at 393. Indeed, it is "beyond doubt" that under intermediate scrutiny the proponent of the challenged classification must show that this assertion "actually comports with fact." *Id.* at 394, n. 3, *quoting Craig v. Boren*, 429 U.S. 190, 199 (1976).

The question then becomes: Did Congress possess an adequate factual basis for the conclusion that members of groups favored by the Federal Construction Procurement

Program have been subjected to racial discrimination? The answer is: Congress did not have any evidence of a pattern or practice of discrimination, let alone "meaningful" evidence, identifying a pattern or practice of discrimination in federal construction contracting. Congress did make several "findings" regarding discrimination. *See* 15 U.S.C. § 631(f)(1), *quoted* at pages 11-12. However, these "findings" were not supported by any empirical fact-finding, nor were they shown to "actually comport[] with fact." *Lamprecht*, 958 F. 2d at 394, n. 3, *quoting Craig v. Boren*, 429 U.S. at 199. Instead, the "findings" merely assert what they purport to prove. Clearly, these findings do not and cannot show that the members of each and every ethnic group singled out for preferential treatment by the Federal Construction Procurement Program actually have suffered from, and continue to suffer from, the effects of racial discrimination.

> There is *absolutely no evidence* of past discrimination against Spanish-speaking, Oriental, Indian, Eskimo, or Aleut person in any aspect of the Richmond construction industry. . . . It may well be that Richmond has never had an Aleut or Eskimo citizen. The random inclusion of racial groups that, as a practical matter, may never have suffered from discrimination in the construction industry . . . suggests that the city's purpose was not in fact to remedy past discrimination.

Croson, 488 U.S. at 506. (Emphasis in original.)[38]

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[38] Although the *Croson* Court was applying strict scrutiny, this passage is cited as an example of over-inclusiveness which occurs from an assumption that all minorities have suffered from discrimination in the construction industry.

The second step in the inquiry is whether the relationship between the race-conscious provisions of the Federal Construction Procurement Program and the objective of remedying identified discrimination against members of now-favored ethnic groups is sufficiently precise. Once again, this inquiry is somewhat looser than under strict scrutiny. However, the fit between the objective to be reached and the means selected for reaching that objective must remain tight enough to alleviate substantially the identified disadvantages. *Lamprecht v. FCC*, 958 F. 2d at 393. Furthermore, any substantial overbreadth in the chosen remedy renders the remedy unconstitutional. This is the very essence of "substantial basis" review.

The violation, by the Federal Construction Procurement Program, of the second step of intermediate scrutiny is even more clear. The race-conscious provision of the Federal Construction Procurement Program directs each federal agency to set goals for minority participation at the "maximum practicable" level. 15 U.S.C. § 644(g). The near limitless preference of the race-conscious Federal Construction Procurement Program cannot be tied to any legitimate remedial objective. Indeed, it has "no logical stopping point" other than the complete exclusion of all non-minority firms from government work. *Wygant*, 476 U.S. at 275. Thus, this statutory provision sweeps so far beyond any legitimate remedial goal that not only is it impossible to conclude that it is "substantially tailored" to a remedial objective, but it is apparent that its only possible function is to increase the amount of business awarded to minority-owned firms. This is "discrimination for its own sake," which is the very essence of a constitutional violation. *Bakke*, 438 U.S. at 305.

As was the case with strict scrutiny, this discussion of legal standards could be extended considerably, but there is no need to do so, because the race-conscious Federal Construction Procurement Program does not even come close to satisfying either prong of intermediate scrutiny.

Of course, the judiciary may grant some decisions of Congress the respect due a co-equal branch of the federal government. *Metro Broadcasting*, 497 U.S. at 569. Nonetheless, the courts "are still obliged in the end to *review* the government's policy – both the judgmcnt of law that the policy is constitutional and the findings of fact that underlie it." *Lamprecht v. FCC*, 958 F. 2d at 391 (emphasis in original). Even more importantly, this Court has held that it must not defer to the judgment of Congress on matters involving suspect classifications:

> [W]e do not defer to the judgment of the Congress . . . on a constitutional question, and would not hesitate to invoke the Constitution should we determine that [Congress] has not fulfilled its task with appropriate sensitivity to equal protection principles.

Metro Broadcasting, 497 U.S. at 569 (citation omitted).[39] This Court must rule on the constitutionality of the race-conscious Federal Construction Procurement Program despite its adoption by Congress.

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[39] The Tenth Circuit recognized this principle. "In reaffirming *Fullilove* as the proper standard for assessing the constitutionality of benign race-conscious measures, the Court in *Metro Broadcasting* noted that, notwithstanding the 'great weight' given to the decisions of Congress, even congressionally-mandated benign race-conscious measures must satisfy equal protection requirements. 110 S. Ct. at 3011 (citation omitted)." (App. 22.)

In the instant case, the facts do not support the claim that the race-conscious Federal Construction Procurement Program is substantially related to the important objective of remedying past discrimination. As a result, this program should be stricken as unconstitutional even if intermediate scrutiny is the appropriate standard of review.

VII. PRIVATE DISCRIMINATION IS "EVIL" AND JUST AS "ODIOUS TO A FREE PEOPLE" AS IS GOVERNMENTAL DISCRIMINATION.

Respondents assert that the race-conscious Federal Construction Procurement Program is constitutional because the SCC provision "operates as a carrot rather than a stick."[40] Respondents argue that bribing a prime contractor with federal funds to discriminate is less constitutionally offensive than direct discrimination by the U.S. Government.

Private discrimination is "evil:" "It is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private discrimination." *Croson*, 488 U.S. at 492. Respondents' attempt to hide behind the prime contractor, asserting that it is he and not the federal government that is discriminating on the basis of race, is an artifice and must be rejected. Since federal funds provide the financial inducement to discriminate in accordance with federal regulations, the discrimination is being done by the federal government. Government financing of private discrimination is "evil" and no less "odious to a free people whose

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[40] Opp. to Pet. 18.

institutions are founded upon the doctrine of equality" since it is direct discrimination by the government itself. *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943); *Shaw v. Reno*, 509 U.S. ___, 125 L.Ed.2d at 526.

VIII. THE CFLHD, WHEN EXCEEDING THE GOALS ADOPTED BY CONGRESS, MUST CONDUCT THE INQUIRY REQUIRED BY *CROSON*.

The CFLHD, and not Congress, made the decision to set aside an additional 7 to 10 percent of its contracts for DBEs.[41] That decision in and of itself is also subject to strict scrutiny. Given the suspect nature of racial classifications, "searching judicial inquiry" is necessary to determine what classifications are remedial and "what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics." *Shaw v. Reno*, 509 U.S. ___, 125 L.Ed.2d 511, 526, citing *Croson*.

The SBA provides, in pertinent part:

> Notwithstanding the government-wide goal, each agency shall have an annual goal that presents, for that agency, the maximum practicable opportunity for . . . small business concerns owned and controlled by socially and economically disadvantaged individuals to participate in the performance of contracts let by such agency.

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[41] Congress set the level for small disadvantaged business participation at five (5) percent. 15 U.S.C. § 644(g)(1). The CFLHD has established a goal of between 12 and 15 percent. Thus, the additional 7 to 10 percent is the result of a decision by the CFLHD.

15 U.S.C. § 644(g). Congress set the goal at five percent, therefore a goal above five percent does not and cannot reflect Congressional judgment that the goal is constitutionally legitimate. It is therefore up to the CLFHD to identify and to set forth the factual justification for the goal that CLFHD has adopted and to do so with sufficient specificity to meet the requirements of the Constitution, as required by this Court in *Croson*, 488 U.S. 469. Clearly, the CFLHD did not satisfy the requirements of strict scrutiny before implementing its set-aside program.

Under *Croson*, this Court requires that, in order to implement a race-based remedial program, the CFLHD must show a "strong basis in evidence" for its conclusion that race-based action was justified. *Croson*, 488 U.S. at 500. In making this showing, the CLFHD cannot rely on generalized congressional findings of nationwide discrimination: "If all a [governmental entity] need do is find a Congressional report on the subject to enact a set-aside program, the constraints of the Equal Protection Clause will, in effect, have been rendered a nullity." *Croson*, 488 U.S. at 504. Instead, the CFLHD must identify the discrimination it seeks to remedy "with some specificity" before it can implement race-conscious relief. *Id.*

In *Croson* this Court held that it was "almost impossible to assess whether the Richmond plan is narrowly tailored to remedy prior discrimination since it is not linked to identified discrimination in any way." *Croson*, 488 U.S. at 507. That very deficiency exists here since the CFLHD failed to set forth any identified discrimination

that provided the factual basis for its 12 to 15 percent race-conscious program.[42]

In order to be considered "narrowly tailored" under *Croson* the benefits of the provision had to be limited to members of ethnic groups who have actually suffered from a pattern of identified state-sponsored discrimination. *Croson*, 488 U.S. at 506. However, the benefits offered by the CLFHD's decision to set aside an additional 7 to 10 percent of its contracts are available to members of numerous minority groups.[43] Not only is there no evidence that members of these groups have suffered from racial discrimination at the hands of the CFLHD, but even if members of one group have been victimized, there is no evidence that members of other groups have similarly suffered.

CONCLUSION

Congress has adopted a race-conscious program that must be reviewed by this Court through the application of "strict scrutiny" so as to ensure the program's compliance with the Constitution's guarantee of equal protection. The application of strict scrutiny reveals that Congress' race-conscious program is not "narrowly tailored" to serve a "compelling governmental interest," since it seeks to redress historic, general, societal discrimination and not

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[42] In fact, as noted above, CLFHD officials have testified that there is no history of racial discrimination in the CFLHD. (R. 10th Cir. # 11, Aplt. App. 339 & 348.)

[43] *See* footnote 9 for a partial list of the "other minorities" included.

specific acts of discrimination on the basis of race. As a result, the race-conscious Federal Construction Procurement Program, and its application to Adarand, so as to prevent it from competing on an equal basis with other guardrail subcontractors, must be declared unconstitutional and set aside.

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Supreme Court of the United States

OCTOBER TERM, 1994

ADARAND CONSTRUCTORS, INC., PETITIONER

v.

FEDERICO PEÑA,
SECRETARY OF TRANSPORTATION, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENTS

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QUESTIONS PRESENTED

1. Whether the equal protection component of the Fifth Amendment prohibits Congress from enacting a rebuttable presumption that minority-owned and -controlled businesses are disadvantaged business enterprises under the Small Business Act.

2. Whether the equal protection component of the Fifth Amendment prohibits the Department of Transportation, pursuant to the Small Business Act, from offering added compensation to federal government prime contractors who choose to subcontract 10% or more of their contract work to disadvantaged business enterprises in order to cover the costs of assisting the disadvantaged businesses.

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BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-24) is reported at 16 F.3d 1537. The opinion and order of the district court (Pet. App. 27-37) are reported at 790 F. Supp. 240.

JURISDICTION

The judgment of the court of appeals was entered on February 16, 1994. The petition for a writ of certiorari was filed on May 17, 1994, and granted on

September 26, 1994. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Spending Clause, the Commerce Clause, and the Thirteenth and Fourteenth Amendments to the Constitution are reprinted at App., *infra*, 1a-2a. Pertinent provisions of the Small Business Act, 15 U.S.C. 631 *et seq.* (1988 & Supp. V 1993), and of Section 106 of the Surface Transportation and Uniform Relocation Assistance Act of 1987, Pub. L. No. 100-17, 101 Stat. 144-146, are reprinted at App., *infra*, 2a-17a.

STATEMENT

This case concerns the constitutionality of a standard contract clause, the Subcontracting Compensation Clause (Clause or SCC), included in highway construction contracts let by the Central Federal Lands Highway Division (CFLHD) of the Federal Highway Administration (FHWA) of the United States Department of Transportation (DOT). The Clause encourages, but does not require, prime contractors to hire small disadvantaged business enterprises (DBEs) as subcontractors on federal highway construction subcontracts by offering them financial compensation for the added expenses of their employing and assisting such subcontractors. Petitioner, a losing bidder on a federal highway guardrail construction subcontract, challenges the constitutionality of the Clause, asserting that it caused the prime contractor to reject its bid and to award the subcontract to Gonzales Construction Company, a small disadvantaged business.

The Federal Lands Highway Program (FLHP)[1] includes the Compensation Clause in its prime contracts as one means to implement its statutory responsibilities under the Small Business Act (SBA), 15 U.S.C. 631 *et seq.* (1988 & Supp. V 1993), which applies to all federal agencies' contracts for goods and services. The Clause also helps the FLHP meet the requirements of the Surface Transportation and Uniform Relocation Assistance Act of 1987 (STURAA), Pub. L. No. 100-17, 101 Stat. 132, which provided the funding for the highway project in this case. The SBA establishes a 5% government-wide minimum goal for participation by small disadvantaged businesses in government contracting and subcontracting, and requires each federal agency to implement that government-wide goal through subsidiary agency goals. STURAA, which applies only to DOT, establishes a goal at not less than 10% for use of small disadvantaged businesses in federally funded transportation programs.

Under both statutes, "disadvantage" requires a showing of both social and economic disadvantage. A presumption of disadvantage operates where members of specified minority groups seek to have their firms certified as disadvantaged. That presumption is rebuttable if disadvantage does not in fact exist.

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[1] The CFLHD is one of three regional divisions of the FLHP, a component of the FHWA. Each of the divisions is responsible for the design and construction of roads on federal lands, including national parks and forests. C.A. App. 320. The CFLHD includes within its jurisdiction roads on federal lands within Arizona, California, Colorado, Hawaii, Kansas, Nebraska, Nevada, New Mexico, North Dakota, South Dakota, Texas, Utah, and Wyoming. Pet. App. 9 n.7.

Under STURAA, small businesses owned by women are also presumed to be disadvantaged; expenditures with businesses owned by women thus constitute expenditures with disadvantaged subcontractors under the Clause, and are counted toward both the STURAA and SBA goals. In addition, businesses owned by men who are not members of minority groups are treated as disadvantaged under both statutes if the persons who own and control the firms are socially and economically disadvantaged. Petitioner, which did not claim that it was itself disadvantaged, did not challenge the fact that Gonzales Construction Company was disadvantaged, nor did it seek to rebut any presumption of disadvantage that may have applied to Gonzales. Petitioner instead makes a facial challenge to the Clause.

1. *Statutory background.* A. Both the SBA and STURAA establish a federal policy of doing business with small disadvantaged business enterprises.[2] The statutes seek to foster nationwide economic development by permitting small disadvantaged businesses to share in the economic benefit of the government's vast purchasing activity. The statutes also reflect Congress's belief that, by contracting with small disadvantaged business enterprises, and by working with them through a variety of business development pro-

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[2] Section 8(d)(1) of the SBA, 15 U.S.C. 637(d)(1) (Supp. V 1993), provides:

> It is the policy of the United States that small business concerns, and small business concerns owned and controlled by socially and economically disadvantaged individuals, shall have the maximum practicable opportunity to participate in the performance of contracts let by any Federal agency, including contracts and subcontracts.

grams, the government can strengthen such businesses and thereby enhance market competition for the goods and services the government buys.

The SBA requires annual, government-wide goals to be set for contracting for supplies and services from small businesses, and also from small disadvantaged businesses. The Act sets a 5% floor for the latter goal. 15 U.S.C. 644(g)(1). The President is required to adjust that government-wide goal annually, and each executive agency is required to develop a goal appropriate to its own contracting needs and the markets from which it purchases goods and services.[3] The goals at every level may be waived where not practicable,[4] and no penalty attaches to failure to meet them.

In STURAA, enacted in 1987, Congress complemented the SBA's provisions by setting a disadvantaged business enterprise goal specific to STURAA transportation construction. Section 106(c)(1) of STURAA contained a goal of not less than 10% for disadvantaged business expenditure of federal funds appropriated under STURAA for fiscal years 1987 through 1992. Pub. L. No. 100-17, 101 Stat. 145.[5] Expenditures through disadvantaged businesses are counted toward both STURAA and SBA goals.

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[3] The subsidiary disadvantaged business contracting goal DOT assigned to the CFLHD for 1989 was approximately 12-15%. Pet. App. 9 n.7.

[4] See 15 U.S.C. 644(h)(1) (requiring justification for failure to meet goals); 49 C.F.R. 23.64(e), 23.65 (setting forth waiver criteria for DOT).

[5] The disadvantaged business enterprise goals are now being implemented under the successor to STURAA, the Intermodal Surface Transportation Efficiency Act of 1991, Pub. L. No. 102-240, § 1003(b), 105 Stat. 1919-1921.

B. The definition of small disadvantaged business that applies under both statutes is set out in the SBA. A small business is one that is independently owned and operated, is not dominant in its field of operation, and has annual gross receipts not in excess of the level set by regulation for the industry in which the business operates. 15 U.S.C. 632(a)(1)-(3) (Supp. V 1993).[6] A small business is disadvantaged if it is at least 51% owned and controlled by persons who are both socially and economically disadvantaged. 15 U.S.C. 637(d)(3)(C) (Supp. V 1993). A "socially disadvantaged" person is one who has been subjected to "racial or ethnic prejudice or cultural bias because of [his or her] identity as a member of a group without regard to [his or her] individual qualities." 15 U.S.C. 637(a)(5). An "economically disadvantaged" person is a socially disadvantaged person who also demonstrates that his or her "ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged." 15 U.S.C. 637(a)(6)(A).

The goals of both the SBA and STURAA are thus directed at the employment of *disadvantaged* business enterprises. That category is not limited to members of racial minority groups, nor are all members of such groups included in the disadvantaged category. Congress, however, expressly recognized in both statutes that racial discrimination in the United States

[6] A small business, in the case of highway construction specialty subcontractors such as Gonzales and petitioner, is one whose average annual gross receipts do not exceed $7,000,000. 13 C.F.R. 121.601 (Major Group 17, SIC Code 1799).

has been a principal cause of current disadvantaged status. Congress found in the SBA that "many [socially and economically disadvantaged] persons are socially disadvantaged because of their identification as members of certain groups that have suffered the effects of discriminatory practices or similar invidious circumstances over which they have no control," and that "such groups include, but are not limited to, Black Americans, Hispanic Americans, Native Americans, Indian tribes, Asian Pacific Americans, Native Hawaiian Organizations, and other minorities." 15 U.S.C. 631(f)(1)(B) and (C). The SBA's subcontracting provision, Section 8(d), thus authorizes prime contractors to "presume that socially and economically disadvantaged individuals include Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities, or any other individual found to be disadvantaged by the [Small Business] Administration pursuant to section 8(a) of the [SBA]." 15 U.S.C. 637(d)(3)(C) (Supp. V 1993). STURAA utilizes the SBA's definition of disadvantaged business, see Pub. L. No. 100-17, § 106(c)(1), 101 Stat. 145, except that STURAA also provides that, in the context of highway construction, "women shall be presumed to be socially and economically disadvantaged individuals," § 106(c)(2)(B), 101 Stat. 146.[7]

C. Congress's findings that disadvantage is highly correlated with race were based on extensive evidence of racial discrimination affecting government con-

[7] The Federal Acquisition Regulations, 48 C.F.R. 52.219-8 and 52.219-13, referred to in the Subcontracting Compensation Clause, J.A. 24, define disadvantaged business consistently with the SBA, and include women-owned businesses.

tracting. The SBA first made express reference to race in the 1978 Amendments to the statute. Act of Oct. 24, 1978, Pub. L. No. 95-507, §§ 201, 211, 92 Stat. 1760, 1767. Congress there recognized "[t]he fact that minority small businesses have had an especially difficult time in fully participating in the economic system," and decided that the SBA's small business development program "should be used only for developing minority and other socially and economically disadvantaged businesses." S. Rep. No. 1070, 95th Cong., 2d Sess. 16 (1978); see also H.R. Rep. No. 1714, 95th Cong., 2d Sess. 22 (1978).[8]

[8] Representative Addabbo, the floor manager of the bill in the House, stated that "[o]ur findings clearly state that groups such as black Americans, Hispanic Americans, and Native Americans, have been and continue to be discriminated against and that this discrimination has led to the social disadvantagement of persons identified by society as members of those groups." 124 Cong. Rec. 34,097 (1978). Senator Nunn, who managed the bill in the Senate, also emphasized that "[b]ecause of present and past discrimination many minorities have suffered social disadvantagement." *Id.* at 35,408.

See S. Rep. No. 1070, *supra*, at 14 (analyzing the 1978 Amendments to SBA Section 8(a) that "establish[ed] the policy goal of developing businesses owned by socially and economically disadvantaged persons" as "also recogniz[ing] the pattern of social and economic discrimination that continues to deprive racial and ethnic minorities, and others, of the opportunity to participate fully in the free enterprise system"); *id.* at 20 ("many individuals are socially and economically disadvantaged as a result of being identified as members of certain groups, including but not limited to, black Americans and Hispanic Americans"); *id.* at 22 (directing the Small Business Administration to "recognize the historic past discrimination of minorities in their efforts to participate in the free enterprise system").

At the time of the 1978 Amendments, minority businesses constituted only 4% of the total number of firms in the United States and accounted for less than 1% of total nationwide business receipts. 124 Cong. Rec. 29,641 (1978) (remarks of Sen. Glenn); *id.* at 29,644 (statement by Sen. Heinz). A 1975 report of the Subcommittee on SBA Oversight and Minority Enterprise of the House Committee on Small Business set forth statistics showing that, "[w]hile minority persons comprise[d] about 16 percent of the Nation's population," only 3% of businesses in the United States were minority-owned. H.R. Rep. No. 468, 94th Cong., 1st Sess. 2. The report determined that those statistics were "not the result of random chance," but resulted from "past discriminatory systems [that] have resulted in present economic inequities." *Ibid.*

Since 1978, Congress has repeatedly revisited the issue of disadvantage in federal contracting caused by racial discrimination,[9] and has found that those

[9] See, *e.g.*, *H.R. 5612, To Amend the Small Business Act to Extend the Current SBA 8(a) Pilot Program: Hearing on H.R. 5612 Before the Senate Select Comm. on Small Business*, 96th Cong., 2d Sess. (1980); *Small and Minority Business in the Decade of the 1980's (Part 1): Hearings Before the House Comm. on Small Business*, 97th Cong., 1st Sess. (1981); *Minority Business and Its Contribution to the U.S. Economy: Hearing Before the Senate Comm. on Small Business*, 97th Cong., 2d Sess. (1982); *Federal Contracting Opportunities for Minority and Women-Owned Businesses—An Examination of the 8(d) Subcontracting Program: Hearings Before the Senate Comm. on Small Business*, 98th Cong., 1st Sess. (1983); *Women Entrepreneurs—Their Success and Problems: Hearing Before the Senate Comm. on Small Business*, 98th Cong., 2d Sess. (1984); *State of Hispanic Small Business in America: Hearing Before the Subcomm. on SBA*

disadvantages continue. Consequently, each time the SBA has been amended, Congress has retained or expanded upon the findings of social disadvantage based on race.[10] When Congress amended the SBA in 1988 to add the disadvantaged business enterprise goals, it reaffirmed that the SBA's disadvantaged business contracting program is "the most significant effort of the Federal Government to reduce the effects of discrimination on entrepreneurial endeavors." 133

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and SBIC Authority, Minority Enterprise, and General Small Business Problems of the House Comm. on Small Business, 99th Cong., 1st Sess. (1985); *Minority Enterprise and General Small Business Problems: Hearing Before the Subcomm. on SBA and SBIC Authority, Minority Enterprise, and General Small Business Problems of the House Comm. on Small Business*, 99th Cong., 1st Sess. (1985); *Disadvantaged Business Set-Asides in Transportation Construction Projects: Hearings Before the Subcomm. on Procurement, Innovation, and Minority Enterprise Development of the House Comm. on Small Business*, 100th Cong., 2d Sess. (1988); *Barriers to Full Minority Participation in Federally Funded Highway Construction Projects: Hearing Before a Subcomm. of the House Comm. on Government Operations*, 100th Cong., 2d Sess. (1988) [hereinafter *1988 Barriers Hearing*]; *Surety Bonds and Minority Contractors: Hearing Before the Subcomm. on Commerce, Consumer Protection, and Competitiveness of the House Comm. on Energy and Commerce*, 100th Cong., 2d Sess. (1988); *Small Business Problems: Hearings Before the House Comm. on Small Business*, 100th Cong., 1st Sess. (1987).

[10] See Act of July 2, 1980, Pub. L. No. 96-302, § 118, 94 Stat. 840; Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, § 18015, 100 Stat. 370 (1986); Business Opportunity Development Reform Act of 1988, Pub. L. No. 100-656, §§ 101, 207, 102 Stat. 3855, 3861-3862.

Cong. Rec. 33,314-33,315 (1987) (remarks of Rep. LaFalce upon introduction of H.R. 1807). The House Committee on Small Business specifically found that "discrimination and the present effects of past discrimination" continue to hinder minority business development, H.R. Rep. No. 460, 100th Cong., 1st Sess. 18 (1987), and that an increase in the effectiveness of the SBA was necessary "to redress the effects of discrimination on entrepreneurial endeavors," *id.* at 16.

Evidence before Congress in 1988 showed that the disadvantaged business program had thus far made unsatisfactory progress in removing discriminatory barriers to minority business success: "[O]nly six percent of all firms are owned by minorities; less than two percent of minorities own businesses while the comparable percent for nonminorities is over six percent; and the average receipts per minority firm is less than 10 percent the average receipts of all businesses." H.R. Rep. No. 460, *supra*, at 18. Federal procurement data revealed a similar pattern: In 1986, "total prime contracts approached $185 billion, yet minority business received only $5 billion in prime contracts, or about 2.7 percent of the prime contract dollar." *Ibid.* Repeating the observations that had been made a decade earlier, the Committee Report concluded that the disparity between minority and nonminority businesses' participation in the economy and in federal procurement was "not the result of random chance," but that "discrimination and the present effects of past discrimination have hurt socially and economically disadvantaged individuals in their entrepreneurial endeavors." *Ibid.*

The enactment of STURAA in 1987 was also supported by additional evidence and findings of racial and gender discrimination specific to the highway

construction industry. The Senate Committee on Environment and Public Works reported on STURAA:

> The Committee has considered extensive testimony and evidence on the bill's DBE provision, and has concluded that this provision is necessary to remedy the discrimination faced by socially and economically disadvantaged persons attempting to compete in the highway and mass transit construction industry. * * *
>
> * * * [B]arriers still remain, preventing minorities and women from successfully competing in the industry. Moreover, the Committee has concluded that the findings adopted by Congress in 1978 when enacting legislation covering projects under the Small Business Act, 15 U.S.C. § 631(e), apply equally to the federally-funded highway and mass transit construction projects covered by this bill.

S. Rep. No. 4, 100th Cong., 1st Sess. 11 (1987). We have collected in Appendix B, *infra*, 18a-36a, more examples of hearings, floor debates and committee reports in which Congress's choice of a limited, race-based remedy was repeatedly debated and reaffirmed.

2. *Regulatory background.* Under the Subcontracting Compensation Clause that is challenged in this case, a small business concern will be considered disadvantaged if it has been certified as such by the Small Business Administration (Administration) or any state highway agency. J.A. 24.[11] In certifying

[11] The Administration certifies disadvantaged businesses pursuant to the Small Business Act and its implementing regulations, 13 C.F.R. Pt. 124. State highway and transportation agencies certify disadvantaged businesses for participation in DOT programs pursuant to 49 C.F.R. Pt. 23. The FLHP also accepts certification by other government agencies, provided the Contracting Officer has determined that comparable procedures are followed. J.A. 24.

businesses as disadvantaged, the Administration determines on a case-by-case basis (a) whether a firm claiming disadvantage is actually owned and controlled by the person claiming disadvantage, (b) whether that person is socially disadvantaged, and (c) whether that person is economically disadvantaged. In making those determinations, the Administration employs a rebuttable presumption that, "[i]n the absence of evidence to the contrary," Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and Subcontinent Asian Americans are socially disadvantaged. 13 C.F.R. 124.105(b). Minority status is, however, neither a sufficient nor a necessary basis for certification. Because the presumption of social disadvantage is rebuttable, members of the specified groups may nonetheless be considered not to be socially disadvantaged. In addition, people who are not members of the specified minority groups may also be treated as disadvantaged under the Clause. 15 U.S.C. 637(a)(5); 13 C.F.R. 124.105-124.106. For example, persons who have suffered ethnic or cultural bias on account of their ancestry, physical handicap,[12] or "long-term residence in an environment isolated from the main-

[12] See, *e.g.*, *Doe* v. *Heatherly*, 671 F. Supp. 1081 (D. Md. 1987) (applying nonracial inquiry into "cultural bias" to evaluate disadvantage claim by person with calligraphic dysgraphia and dyslexia), aff'd, 854 F.2d 1316 (4th Cir. 1988) (Table).

stream of American society" may be deemed socially disadvantaged. 13 C.F.R. 124.105(c)(1)(i).[13]

Small business owners who establish their social disadvantage must also demonstrate to the Administration that they are economically disadvantaged "as compared to others in the same business area who are not socially disadvantaged." 15 U.S.C. 637(a)(6)(A); 13 C.F.R. 124.106(b). The separate showing of economic disadvantage ensures that certification does not "assist concerns owned and controlled by socially disadvantaged individuals who have accumulated substantial wealth, who have unlimited growth potential or who have not experienced or have overcome impediments to obtaining access to financing, markets and resources." 13 C.F.R. 124.106(a)(1)(ii). In evaluating whether a business owner is in fact economically disadvantaged, the Administration considers the personal financial condition, business financial condition, and access to credit and capital of the individual claiming disadvantaged status. 13 C.F.R. 124.106(a)(2).[14]

Where a competitor, such as petitioner, believes that a certification of a subcontractor as disadvantaged is unwarranted, it may submit information to

[13] The Administration "will entertain any relevant evidence in assessing [the social disadvantage] element of an applicant's case," 13 C.F.R. 124.105(c)(1)(v), and the regulations set forth factors to be taken into account, 13 C.F.R. 124.105(c)(1)(v)(A)-(C) (education, employment, business history).

[14] See, *e.g.*, *Autek Systems Corp.* v. *United States*, 835 F. Supp. 13 (D.D.C. 1993) (upholding Administration's determination that minority business owner's personal income disqualified him from participation), aff'd, No. 93-5399 (D.C. Cir. May 13, 1994).

the contracting officer and seek initiation of a protest. 13 C.F.R. 124.603(b); see generally 13 C.F.R. Pt. 124, Subpt. B. "No specific form is required" for a protest to disadvantaged status, 13 C.F.R. 124.607(a), and it may be filed at any time before the work under the subcontract is completed, 13 C.F.R. 124.605(b)(2). When such a protest is filed, the Administration must investigate, 13 C.F.R. 124.608, and make a prompt determination as to disadvantage, 13 C.F.R. 124.609. In making that determination, the Administration is required to review "ownership and control of each protested firm as well as social and economic disadvantage regardless of the grounds specified in the protest." 13 C.F.R. 124.609(d)(3).[15]

States that certify disadvantaged businesses apply standards that generally mirror those promulgated under the SBA. 49 C.F.R. Pt. 23, Subpt. D; see Pet. App. 8. Under STURAA's implementing regulations, as under the SBA's, members of certain minority groups are rebuttably presumed to be disadvantaged. 49 C.F.R. 23.62.[16] However, state certification of dis-

[15] The Administration has independent review responsibilities even in the absence of a protest. The SBA provides that businesses that are not in fact both socially and economically disadvantaged must be decertified or "graduated." 15 U.S.C. 636(j)(10)(F) and (H) (1988 & Supp. V 1993), 637(a)(6)(C) (Supp. V 1993); 13 C.F.R. 124.208. The financial information that disadvantaged businesses must file annually, 15 U.S.C. 637(a)(6)(B), or credible evidence coming to the attention of the Administration from any other source, 13 C.F.R. 124.101(c)(2), 124.111(c), may trigger a review, and the Administration is required to investigate and to satisfy itself that the criteria have been met, 15 U.S.C. 637(a)(6)(C)(i) (Supp. V 1993).

[16] The groups as to which the rebuttable presumption applies are virtually the same under both statutes. Both include

advantage under STURAA, like certification by the Small Business Administration, is also available to nonminorities.[17] Thus, persons such as "disabled Vietnam veterans, Appalachian white males, Hasidic Jews, or any other individuals who are able to demonstrate to the [State] that they are socially and economically disadvantaged may be treated as eligible to own and control a disadvantaged business, on the same basis as a member of one of the presumptive

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Black Americans, Hispanic Americans, Native Americans, and Asian-Pacific Americans. The STURAA regulations, however, specify "Asian-Indian Americans" in place of the SBA regulations' "Subcontinent Asian Americans." Compare 49 C.F.R. 23.62(a)-(e) ("socially and economically disadvantaged individuals") (defining precise contours of listed groups) with 13 C.F.R. 124.105(b)(1) (same).

The rebuttable presumption under DOT's STURAA regulations provides that "members of the named [minority] groups * * * are presumed to be both socially and economically disadvantaged," 49 C.F.R. Pt. 23, Subpt. D, App. C ¶ 2, while the parallel presumption in the SBA regulations applies only to social disadvantage. Under both sets of regulations, the certifying agency is entitled to consider all relevant evidence in order to ensure that the statutory disadvantage criteria are met as to each subcontractor. With respect to the rebuttal of the presumption, see 49 C.F.R. 23.62, the STURAA regulations provide that "[a]ny third party" may bring a challenge, 49 C.F.R. 23.69(b)(1); see 49 C.F.R. Pt. 23, Subpt. E, and may "present evidence that the firm's owners are not truly socially and/or economically disadvantaged, even though they are members of one of the presumptive groups," 49 C.F.R. Pt. 23, Subpt. D, App. C ¶ 2.

[17] The state agencies "may determine, on a case-by-case basis, that individuals who are not a member [*sic*] of one of the [minority] groups are socially and economically disadvantaged." 49 C.F.R. 23.62 (defining "socially and economically disadvantaged individuals"); see 49 C.F.R. Pt. 23, Subpt. D, App. A ¶ 10 (analysis of Section 23.62).

groups." 49 C.F.R. Pt. 23, Subpt. D, App. A ¶ 10 (analysis of Section 23.62). Women are also presumed to be socially and economically disadvantaged. 49 C.F.R. 23.62; see also 48 C.F.R. 52.219-13 (cited in Subcontracting Compensation Clause, J.A. 24).

3. *The Subcontracting Compensation Clause.* The Subcontracting Compensation Clause is a standard clause developed by FHWA's Federal Lands Highway Program and is used in most of the Program's sealed-bid contracts. The Clause is one of several means employed to aid DOT in implementing its statutory responsibilities to make efforts to expend contract and subcontract funds through disadvantaged small businesses. As its name suggests, the Clause is designed to offset the financial disincentives that would otherwise exist to employing and assisting disadvantaged businesses as subcontractors by covering the additional expenses associated with such employment. J.A. 24-26; Pet. App. 10; C.A. Supp. App. 33-34, 54, 108-109. In return for compensation under the Clause, the prime contractor thus must agree to

> locate, train, utilize, assist, and develop [disadvantaged businesses] to become fully qualified contractors in the transportation facilities construction field. The Contractor shall also provide direct assistance to disadvantaged subcontractors in acquiring the necessary bonding, obtaining price quotations, analyzing plans and specifications, and planning and management of the work.

J.A. 25.

Compensation is available to a prime contractor under the Clause when at least 10% of the prime contract amount is expended with one or more dis-

advantaged subcontractors. J.A. 25.[18] The Clause limits compensation to 10% of the amount actually subcontracted to disadvantaged subcontractors. In this case, the subcontract amount was $104,800; the prime contractor was thus entitled to compensation of approximately $10,000. Pet. App. 11. In addition, total compensation under the Clause may not exceed 1.5% of the prime contract amount if the prime contractor employs one disadvantaged subcontractor, or 2% of the prime contract amount if the prime contractor employs more than one disadvantaged subcontractor. J.A. 26. Thus, if Mountain Gravel and Construction Company (Mountain Gravel), the prime contractor on the project involved in this case, had subcontracted 40% of the work on a $1,000,000 project, its compensation would not be the full $40,000 representing 10% of the subcontracted amount; rather, if one disadvantaged subcontractor performed the entire 40% portion, compensation would be capped at $15,000 (i.e., 1.5% of the prime contract amount), and if more than one disadvantaged firm were involved, compensation could not exceed $20,000 (i.e., 2% of the prime contract amount). The compensation amount is deemed to be "full compensation for locating, selecting, training, and assisting DBE subcontractors; for maintaining supporting records; and for supplying all facilities and services to complete this DBE subcontracting provision." *Ibid.* The Clause does not impose any requirement that prime contractors subcontract with any disadvantaged subcontractors; a prime contractor remains fully eligible to be awarded a contract whether or not it does

[18] This 10% threshold can be modified "based on the availability of eligible subcontractors." C.A. Supp. App. 39-40, 52-53, 103.

so. See Pet. App. 7; J.A. 25 (eligibility for compensation); C.A. Supp. App. 96.[19]

4. *Proceedings below.* A. In September 1989, the CFLHD awarded Mountain Gravel a prime contract for a federally funded highway construction project in the San Juan National Forest known as the West Dolores project. Pet. App. 9. The contract included the Subcontracting Compensation Clause. *Id.* at 10. Mountain Gravel solicited bids to subcontract the guardrail installation portion of the contract. In subcontracting, Mountain Gravel was not required to accept the lowest bid. Although petitioner submitted a slightly lower bid, Mountain Gravel awarded the guardrail subcontract to Gonzales, a certified small disadvantaged business, and thus received compensation under the Clause. *Id.* at 10-11. Petitioner did not seek disadvantaged status for itself, did not

[19] The mechanism of prime contractors assisting disadvantaged businesses in a mentor-like relationship was proposed to Congress by the American Association of State Highway and Transportation Officials (AASHTO) in a hearing that preceded the passage of STURAA. See *The Disadvantaged Business Enterprise Program of the Federal-Aid Highway Act: Hearing Before the Subcomm. on Transportation of the Senate Comm. on Environment and Public Works*, 99th Cong., 1st Sess. 101 (1985) ("The management of a highway contracting organization requires many skills, including knowledge of estimating and bidding, the employment and administration of managers, technicians and laborers, and the overall financial management of the business. These skills are not easily learned[.] * * * In time, it can be expected that as expertise is acquired, many of today's subcontractors will become prime or general contractors if they so desire. To help this process along, we believe in AASHTO that wider usage of the mentor-protege concept, the formation of partnerships between new DBE and WBE firms and established contracting organizations, holds great promise.").

question Gonzales's actual disadvantaged status, and did not seek to rebut any presumption that might have been applied to Gonzales in the certification process.

On August 10, 1990, petitioner filed suit for declaratory and injunctive relief against officials of DOT, alleging that the use of the Clause violates 42 U.S.C. 1983, Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d, and the Fifth and Fourteenth Amendments to the Constitution. On cross-motions for summary judgment, the district court granted summary judgment for respondents. Pet. App. 27-37. The court rejected petitioner's argument that the challenged federal program must be subjected to strict judicial scrutiny under *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469 (1989), holding instead that *Fullilove* v. *Klutznick*, 448 U.S. 448 (1980), and *Metro Broadcasting, Inc.* v. *FCC*, 497 U.S. 547 (1990), establish the relevant standard. The district court was satisfied that here, as in *Fullilove*, Congress had an "abundant historical basis" to support the challenged program. Pet. App. 35 (quoting *Fullilove*, 448 U.S. at 478 (opinion of Burger, C.J.)). "[T]he mere fact that CFLHD implements a federal program within Colorado does not convert it into a state program requiring *Croson*-type analysis." Pet. App. 34.

The district court held that the Clause is narrowly tailored to serve Congress's important objectives. Pet. App. 35-36. The court found that the Clause is not "overinclusive," because the annual certification process ensures that only legitimately disadvantaged subcontractors participate in the program. *Ibid.* It is also not "underinclusive," because disadvantaged

firms that are not presumptively disadvantaged may apply for certification and become qualified to participate. *Id.* at 36. The court further noted that the waiver mechanism properly relieves federal agencies of their disadvantaged business obligations when there are not enough qualified disadvantaged businesses available to achieve the agency's goal. *Ibid.*

B. The court of appeals affirmed. Pet. App. 1-24. In an undivided opinion, the court held, as had the district court, that *Fullilove*, not *Croson*, controls. *Id.* at 15. "Under *Fullilove*, if Congress has expressly mandated a race-conscious program, a court must apply a lenient standard, resembling intermediate scrutiny, in assessing the program's constitutionality." *Ibid.* "Indeed," the court observed, "the *Metro Broadcasting* majority held that even non-remedial race-conscious measures mandated by Congress are constitutionally permissible if they satisfy intermediate scrutiny." *Id.* at 19.

The court rejected petitioner's argument that, because the challenged program was also "fashioned and specified by an agency and not by Congress," Pet. App. 17, particularized findings of past discrimination were required to justify the program under *Croson*. The court stated that "[petitioner] cites no authority, nor do we know of any, to support the proposition that a federal agency must make independent findings to justify the use of a benign race-conscious program implemented in accordance with federal requirements." *Id.* at 18. The court of appeals found that the particular aspects of the program petitioner challenges were specifically authorized by Congress. In including the Subcontracting Compensation Clause in prime contracts, the CFLHD thus "did exactly what Congress explicitly directed it to do" under the SBA. *Id.* at 20.

Finally, the court of appeals held that the Clause is constitutional because it is narrowly tailored to achieve the important governmental objective of providing opportunities for minority subcontractors. "The qualifying criteria of the SCC program [are] not limited to members of racial minority groups," and "minority businesses that do not satisfy that economic criteria cannot qualify for DBE status." Pet. App. 23. The court also pointed out that the 10% threshold for using disadvantaged subcontractors in the Clause "is an optional goal, not a set-aside," because "it is entirely at the discretion of the prime contractor whether to exercise its option under the Subcontracting Compensation Clause." *Id.* at 12 n.9. The SCC program was " 'appropriately limited in * * * duration' because federal procurement and construction contracting practices are subject to regular 'reassessment and reevaluation by Congress.' " *Id.* at 23 (quoting *Fullilove*, 448 U.S. at 489 (opinion of Burger, C.J.)).

SUMMARY OF ARGUMENT

I. A. Petitioner has brought a facial constitutional challenge to the use of the Subcontracting Compensation Clause on the ground that it incorporates race-based classifications. The Clause, however, is substantively based on *disadvantaged* status; race plays a role in the operation of the Clause only through a rebuttable presumption that small businesses owned and controlled by members of racial minority groups are disadvantaged. That presumption may be set aside or rebutted if a minority subcontractor is not actually disadvantaged. In addition, the compensation program challenged by petitioner applies to encourage the utilization of disadvantaged subcontractors who are not members of minority groups.

Petitioner also mischaracterizes goals set under the Small Business Act as "race-based set-asides." Those goals, however, are neither based on race nor are they used to set aside funds exclusively for minorities. The goals do not apply to all minority businesses, but only to those owned by disadvantaged minorities. The goals also apply to government contracting with women and members of other disadvantaged groups. Because the percentage levels of the goals are not tied to race, they are not subject to heightened constitutional scrutiny.

B. Petitioner lacks standing to challenge the use of the rebuttable presumption associated with the Subcontracting Compensation Clause. Petitioner failed to show that the presumption was applied to the successful bidder in this case, or that, if it was applied, it led to an incorrect determination of disadvantage. Nor did petitioner show that it was itself disadvantaged. Petitioner, moreover, seeks only future relief, to which it is not entitled on a record that demonstrates, at best, only remote and speculative future harm.

C. Nor is the challenged Clause correctly viewed as conferring a racial preference. The Clause does not create an artificial incentive to subcontract with disadvantaged businesses. It seeks instead to remove disincentives to using such businesses by compensating prime contractors for the additional expenses and time associated with that use. Specifically, the Clause requests that prime contractors train and assist disadvantaged subcontractors, and, where they agree to do so, it offers them compensation to offset the cost to them of such additional effort.

D. Because the challenged presumption was enacted by Congress as a remedial measure based on legislative findings of racial discrimination affecting minority business opportunity, intermediate scrutiny

is the appropriate standard of constitutional review. The presumption is, however, constitutional under any degree of scrutiny. It serves a compelling remedial objective, and, because rebuttable and nonexclusive, is closely tailored to serve that objective. Congress determined that a remedy was necessary based on its findings that racial discrimination continues to impair minority access to subcontracting opportunities in federal procurement generally, and in road construction specifically.

E. The presumption challenged in this case is more narrowly tailored than any race-based remedial measure this Court has yet considered. It is not underinclusive, because it provides the same compensation for contracting with nonminority-owned as with minority-owned disadvantaged small businesses. It is not overinclusive, because it is accompanied by procedures to exclude minorities who are not in fact disadvantaged. The Clause imposes no fixed requirement of subcontracting with disadvantaged businesses and is neither a set-aside nor a quota. The presumption employed under the Clause is also appropriately limited in duration, because it is subject to active and ongoing congressional assessment of its continuing necessity.

II. Finally, this Court should reaffirm its decision in *Fullilove*. As clarified by this Court's subsequent decisions in *Croson* and *Metro Broadcasting*, *Fullilove* has provided a workable standard of constitutional review of race-conscious measures adopted by Congress after extensive factfinding and deliberation. There is no conflict in the Circuits regarding the proper application of *Fullilove*. The decision in that case reflects appropriate judicial respect for congressional determinations on matters of race that touch federal spending programs.

ARGUMENT

I. THE SUBCONTRACTING COMPENSATION CLAUSE IS CONSTITUTIONAL

A. The Clause Is Based On Social And Economic Disadvantage; Minority Racial Status Plays Only A Procedural Role Through A Rebuttable Presumption Of Such Disadvantage

Petitioner challenges the Subcontracting Compensation Clause on its face. Although that Clause employs a presumption of disadvantage that is based on racial group membership, the presumption is rebuttable and nonconclusive. The presumption therefore plays a procedural rather than a substantive role in the contracting program that employs the Clause. The program is, at the same time, open to subcontractors who have been the targets of ethnic prejudice or cultural bias, as well as to those subcontractors who have been victims of racial prejudice.[20] All subcontractors covered by the Clause also must, in addition to having suffered social disadvantage caused by group prejudice or bias, have suffered economic disadvantage.

A member of a racial minority group who has not himself or herself been the victim of racial prejudice is thus not to be treated as disadvantaged under the challenged program. Nor is such a minority group member to be treated as disadvantaged, even if he or she has been the victim of racial prejudice, if that prejudice has not resulted in economic disadvantage to him or her. On the other hand, subcontractors who are not racial minorities *are* to be included in the program if they are both economically and so-

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[20] The program also broadly covers all disadvantage caused by racial prejudice—not only racial prejudice directed against racial minorities. Cf. *McDonald* v. *Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976).

cially disadvantaged. Women subcontractors constitute the largest category of nonminorities who are included. Members of ethnic minorities are also covered. In addition, the Conference Report on the 1978 SBA Amendments refers to the potential disadvantaged status of "a poor Appalachian white person," see H.R. Rep. No. 1714, *supra*, at 22, and the regulations under STURAA give disabled Vietnam veterans and members of Hasidic Jewish sects as other illustrations of the program's reach beyond racial minorities, see 49 C.F.R. Pt. 23, Subpt. D, App. A ¶ 10.

The Subcontracting Compensation Clause program is thus a program based on *disadvantage*, not on race. There is no constitutional impediment to legislative action based on such disadvantage beyond the requirement that the means be nonarbitrary and rationally related to the objective. Government regulation "in the social and economic field" requires only the most relaxed judicial scrutiny. See *Dandridge* v. *Williams*, 397 U.S. 471, 484 (1970). Congress's decision to foster the economic development of small disadvantaged businesses clearly serves legitimate objectives—improving the disadvantaged businesses' stability and business competence, and enhancing competition in the marketplace for government contracts—and the means chosen by Congress to achieve those objectives are just as clearly rationally related to the legislative ends.

Petitioner's facial challenge to the CFLHD's goals depends entirely on its inaccurate assertion that they are race-based. Petitioner erroneously equates disadvantaged businesses with *minority* businesses, asserting that, "[w]hile Congress may have had a basis for the adoption of a program authorizing the set-aside of 5 percent of government contracts *on the basis of race*, * * * the decision by the CFLHD to

adopt a program in which 12 to 15 percent of its contracting funds are apportioned *on the basis of race* is without the factual basis required by this Court." Pet. Br. 20 (emphasis added); see *id.* at 47-49. However, all percentages that petitioner refers to—including the 5% SBA goal, the 10% STURAA goal, the 12-15% CFLHD goal, and the 10% subcontracting threshold in the SCC—reflect expenditures with disadvantaged businesses of all types, nonminority-owned as well as minority-owned. Petitioner's incorrect characterization of the goals as race-based leads it to focus on the level of the goals, and on how and by whom they are set. If petitioner seeks to challenge the Clause as race-conscious, the proper focus of that challenge is on the only aspect of the program that is race-based: the race-based rebuttable presumption used in some certification determinations under the Subcontracting Compensation Clause.

B. Petitioner Lacks Standing To Challenge The Use Of The Race-Based Rebuttable Presumption

The Subcontracting Compensation Clause employs a race-based criterion in the limited form of a rebuttable presumption of disadvantage flowing from minority group membership. As we explain below, that presumption, although calling for intermediate scrutiny under the Court's equal protection precedents, easily passes constitutional muster. As a preliminary matter, however, we believe that petitioner has failed to demonstrate, as it must, that it has standing to challenge the limited procedural use of that racial criterion in the Compensation Clause program. Petitioner has completely failed to show that the presumption affected the award of the subcontract in this case to another bidder, and petitioner has also failed to allege or prove that the future

relief it seeks would affect its business opportunities.

Petitioner challenges its loss of a subcontract that was awarded to a certified disadvantaged business enterprise, arguing that the contract award was the result of a racial preference, but has failed to establish that race played any role whatever in the challenged award. First, petitioner never alleged or proved that the basis of Gonzales Construction Company's certification as a disadvantaged business was its ownership and control by a member of a racial minority group. Petitioner submitted no evidence regarding the criteria actually used in that certification.[21] So far as the record reveals, Gonzales may have been certified as a disadvantaged business because of ownership and control by a woman, by an ethnic minority, or by a physically disabled person, or on some other ground.[22] There has thus been no showing that the race-based rebuttable presumption, which is the only racial component of the challenged program, was actually applied so as to affect the award of the subcontract in this case.

Second, petitioner failed to establish that, even assuming that Gonzales's ownership by a racial minority group member was the basis of the certification, the owner was not socially and economically disadvantaged. Although the SBA and STURAA regulations provide a procedure through which any interested person may challenge whether a certified

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[21] Petitioner did not depose or otherwise seek discovery from the owner of the Gonzales firm, nor from any of the state or SBA officials involved in disadvantaged business certifications.

[22] Petitioner simply refers repeatedly and consistently to Gonzales as a disadvantaged business enterprise, or "DBE," without indicating the basis of the finding of disadvantage. See, *e.g.*, J.A. 18 (Complaint); Pls. Answers to Defs. Interrog. 16; Pet. 5; Pet. Br. 11; see J.A. 30.

disadvantaged subcontractor is actually disadvantaged, 13 C.F.R. Pt. 124, Subpt. B; 49 C.F.R. 23.69, petitioner chose chose not to take advantage of that procedure. A challenge by petitioner to Gonzales's certification would have required the certifying agency not simply to confirm the race of those who own and control the company, but to review and verify the company's actual disadvantaged status. See 13 C.F.R. 124.608-124.609; 49 C.F.R. Pt. 23, Subpt. D, App. C. If Gonzales is actually disadvantaged and if petitioner, as appears, see Pet. Br. 24 n.21, had a fair opportunity to challenge that status but chose not to do so, petitioner can hardly claim now that any rebuttable presumption used to determine that Gonzales was disadvantaged was unconstitutional.

Nor has petitioner ever claimed or established that it is itself disadvantaged. Thus, petitioner cannot challenge the rebuttable presumption on the ground that it unconstitutionally prefers minorities by making it easier for them than for nonminorities to be certified as disadvantaged.

The abstract nature of petitioner's claim is further underscored by its failure to show that the relief it seeks would actually affect its business. Petitioner does not seek retrospective relief for Mountain Gravel's failure to award it the subcontract. Rather, petitioner seeks only to enjoin and declare unlawful the future use of the Clause by the FHLP. J.A. 22-23. Petitioner thus has standing only if it faces " 'actual or imminent' injury." *Lujan* v. *Defenders of Wildlife*, 112 S. Ct. 2130, 2138 (1992). The asserted future harm upon which petitioner's claim is based is, however, both remote and highly contingent. In the 18 years that petitioner has been in the guardrail construction business, the subcontract on the West Dolores project is the only subcontract that

petitioner has allegedly lost due to the Subcontracting Compensation Clause. Pls. Answers to Defs. Interrog., Attachs. 1, 3. In Colorado, where petitioner bids, the only agency using the Clause is the CFLHD, which has on average less than one guardrail subcontract per year in each State. Defs. Answers to Pls. Interrog. 13. Petitioner has not always bid on government subcontracts, and when it did it most often failed to make the lowest bid. Pls. Answers to Defs. Interrog. 9, Attach. 1. In addition, most highway construction projects on which petitioner bids are not administered by the CFLHD, but by the State, and therefore do not include the Subcontracting Compensation Clause. Finally, if petitioner lost future contracts under the Clause to disadvantaged businesses owned by nonminorities, an injunction against use of the racial presumption in the Clause would provide it no relief. All these factors make the "links in the chain of causation between the challenged Government conduct and the asserted injury * * * far too weak for the chain as a whole to sustain [petitioner's] standing." *Allen* v. *Wright*, 468 U.S. 737, 759 (1984).[23]

Petitioner, in sum, has not established—nor does it appear to have—any factual basis for challenging

[23] *Northeastern Florida Chapter of Associated General Contractors* v. *City of Jacksonville*, 113 S. Ct. 2297 (1993), is not to the contrary. That case was brought by an association of 240 contractors and subcontractors that regularly bid on contracts affected by the challenged set-aside, in contrast to petitioner here, which faces only the most speculative chance that it will be affected by the challenged program. The program in *City of Jacksonville* was also fundamentally different from the one at issue here, because it was an exclusively minority program, whereas the Clause here neither prevents petitioner from obtaining certification as a disadvantaged business nor, even if not so certified, from bidding on and obtaining subcontracts on prime contracts including the Clause.

the constitutionality of the only factor of any kind in the Compensation Clause program that is based on minority racial status. As we show below, the rebuttable presumption, in the context of a program that seeks not to give a preference, but to alleviate discriminatory barriers that would otherwise imperil disadvantaged subcontractors, is unquestionably constitutional. On the present record, however, the only aspect of the Compensation Clause open to challenge is its implementation of Congress's decision to increase the share of federal procurement business allocated to disadvantaged subcontractors, whether minority or not. There can be no serious question as to the legitimacy of that congressional objective.

C. The Clause Does Not Constitute A Preference For Disadvantaged Subcontractors

Petitioner's constitutional attack on the Subcontracting Compensation Clause depends not only on petitioner's incorrect assertion that the Clause focuses on race rather than disadvantage, but also on its contention that the Clause constitutes a "bonus" or "reward" (Pet. Br. 9 & n.9, 10 & n.12, 11) to prime contractors to induce them to prefer contracting with disadvantaged subcontractors. That contention is also factually erroneous.

Rather than constituting a preference for disadvantaged subcontractors, the Compensation Clause is designed to remove barriers that would otherwise exist to the free participation by disadvantaged businesses in bidding for subcontracts on federal highway projects. As explained by the text of the Clause itself and by the legislative record, disadvantaged subcontractors, who by definition must have diminished capital resources and credit opportunities, will, without assistance, often be unable to compete with more affluent subcontractors for work on gov-

ernment projects. The Clause is part of a FLHP effort to encourage prime contractors on federal highway projects to lend that needed assistance and to be willing to utilize disadvantaged subcontractors despite the extra costs associated with that effort.

As the Clause notes, among the additional costs of employing disadvantaged subcontractors are payments to assist the subcontractors to get bonding, the expense and time involved in providing assistance in business, financial and labor management, and technical planning and organization of the subcontracted work. J.A. 25-26. The prime contractor is required to keep records "documenting these activities and shall make them available for Government review upon request." J.A. 25. If those extra expenses were not negated by the Clause, disadvantaged subcontractors would often either be denied needed assistance, be forced to submit higher bids than more affluent subcontractors who face fewer disadvantages, or be excluded from government procurement business altogether. Any of those results would conflict with Congress's objectives of using its procurement program to spur economic development and of encouraging healthy price competition on government projects.[24]

[24] Petitioner has made no effort to show that the compensation figure used under the Clause exceeds the costs of doing business with disadvantaged subcontractors so as to constitute a preferential "bonus" or "reward." In addition, compensation is initially calculated at 10% of the dollar amount of the subcontracts placed with disadvantaged businesses, but cannot exceed 2% of the amount of the prime contract. Thus, any affirmative incentive it might provide in a particular situation would, in all events, be a limited one.

D. The Rebuttable Presumption Of Disadvantage Is Based On Congressional Findings Of Racial Discrimination And Serves The Compelling Governmental Objective Of Remedying Past Discrimination

In amending the SBA since the mid-1970's, and in enacting STURAA in 1987, Congress identified past and continuing racial discrimination, specifically including discrimination in the highway construction industry, as having impaired the ability of minorities to participate in economic activity, and it sought to ensure that federal procurement spending not compound the effects of that discrimination, but rather help to remedy it. In this effort, Congress chose to utilize, in addition to other means, a narrow and flexible rebuttable presumption of disadvantage applicable to racial minorities seeking to participate in federal contracting activity. Insofar as petitioner has standing to raise the issue, this case presents the question whether, in assessing the disadvantaged status of a particular small business, the CFLHD may properly rely on certifications of disadvantage in which the presumption has been employed.[25]

The presumption itself is both nonconclusive and rebuttable. Certifying agencies are to presume disadvantage if a subcontractor is a member of any of

[25] As noted, petitioner has not identified the certification process actually used in this case. For that reason, it is unclear which regulations are at issue—those under the SBA or those under STURAA. Accordingly, in order to reverse the decision below, this Court would have to find all potentially applicable regulations facially unconstitutional. See *Reno* v. *Flores*, 113 S. Ct. 1439, 1446 (1993) (citing *United States* v. *Salerno*, 481 U.S. 739, 745 (1987)). So long as the "projected administration give[s] reasonable assurance that the program will function within constitutional limitations," *Fullilove* v. *Klutznick*, 448 U.S. 448, 490 (1980) (opinion of Burger, C.J.), the program must be upheld.

a list of minority groups, or, in the case of the agencies implementing STURAA, is a women. The overriding statutory obligation of the certifying agencies remains that of determining whether each small business is, in fact, socially and economically disadvantaged; the agency may rely on the presumption only in the absence of contrary information. Where available information shows, for example, a lack of economic disadvantage, the presumption must be disregarded. Moreover, unlike a court, the certifying agency is entitled to implement independent investigative procedures to satisfy itself that the statutory criteria are being met.[26] In addition, in any case in which a non-disadvantaged business believes application of the presumption may result in discrimination against it, it may trigger an investigation into whether the minority business has truly suffered both social and economic disadvantage.

1. *Race-based remedial action by Congress is subject to intermediate scrutiny.* This Court has never applied strict scrutiny to a remedial, race-conscious measure adopted by Congress, and should not do so here, where the program involves neither a quota, a set-aside, nor any other kind of substantive racial preference. Cf. *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469, 499 (1989). The rebuttable presumption employed in programs under the SBA and STURAA is instead subject to the intermediate standard of review set forth in this Court's decisions

[26] See Federal Highway Administration, U.S. Dep't of Transportation, *Disadvantaged Business Enterprise (DBE) Program Administration Participant's Manual* 65 (Apr. 1990) (advising state agencies to require applicants for disadvantaged business certification to submit gross receipts for at least three previous years and income tax returns for each owner); STURAA § 106(c)(4), 101 Stat. 146.

in *Metro Broadcasting, Inc.* v. *FCC*, 497 U.S. 547 (1990), and *Fullilove* v. *Klutznick*, 448 U.S. 448 (1980).

Intermediate scrutiny applies because of Congress's broad powers in matters of race. Those powers derive from an "amalgam" of sources, *Metro Broadcasting*, 497 U.S. at 564 n.11 (quoting *Fullilove*, 448 U.S. at 473 (opinion of Burger, C.J.)), including Congress's "institutional competence as the National Legislature," as well as its constitutional powers under the Spending Clause,[27] the Commerce Clause,[28] and the enforcement clauses of the Civil War Amendments, *Metro Broadcasting*, 497 U.S. at 563. Unlike the States and localities, Congress is a co-equal branch, and the Court is bound to give its decisions "great weight." *Fullilove*, 448 U.S. at 472 (opinion of Burger, C.J.). Congress's role as the national legislature—a bicameral, representative body subject to presidential veto—makes it less likely than state or local governing bodies to be captured by parochial and biased interests. It thus does not present the "height-

[27] Article I, Section 8, Clause 1. See *Fullilove*, 448 U.S. at 474 (opinion of Burger, C.J.); *Metro Broadcasting*, 497 U.S. at 563. "It is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice." *Croson*, 488 U.S. at 492 (citing *Norwood* v. *Harrison*, 413 U.S. 455, 465 (1973)).

[28] Congress has vast powers under the Commerce Clause, Article 1, Section 8, Clause 3, to regulate any activity that "has a real and substantial relation to the national interest." *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241, 255 (1964); *EEOC* v. *Wyoming*, 460 U.S. 226 (1983); *id.* at 248 (Stevens, J., concurring); *Hodel* v. *Indiana*, 452 U.S. 314, 323-324 (1981); *Katzenbach* v. *McClung*, 379 U.S. 294, 304 (1964).

ened danger of oppression from political factions" present in smaller political units. *Croson*, 488 U.S. at 523 (Scalia, J., concurring in the judgment).[29] Moreover, in the event that Congress should err in its choice of a remedy, its broadly representative character provides a check.

In matters of race, the Civil War Amendments expressly granted "additional powers to the Federal government," and specifically to Congress, and laid "additional restraints upon those of the States." *Croson*, 488 U.S. at 491 (opinion of O'Connor, J.) (quoting the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 68 (1873)).[30] "It is fundamental that in no organ of government, state or federal, does there repose a more comprehensive remedial power than in the Congress, expressly charged by the Constitution with competence and authority to enforce equal protection guarantees." *Fullilove*, 448 U.S. at 483 (opinion of Burger, C.J.); *id.* at 508-510 (Powell, J., concurring).[31]

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[29] See also *Fullilove*, 448 U.S. at 473 (opinion of Burger, C.J.) (federal legislation represents not a conclusion reached "by a single judge or a school board, but a considered decision of the Congress and the President").

[30] "[I]t is one thing to permit racially based conduct by the Federal Government—whose legislative powers concerning matters of race were explicitly enhanced by the Fourteenth Amendment, see U.S. Const., Amdt. 14, § 5—and quite another to permit it by the precise entities against whose conduct in matters of race that Amendment was specifically directed." *Croson*, 488 U.S. at 521-522 (Scalia, J., concurring in the judgment).

[31] As those Justices who addressed the issue in *Croson* took care to point out, Congress has powers that States and localities lack to act in an affirmative, race-conscious manner. 488 U.S. at 486-493 (opinion of O'Connor, J., joined by Rehnquist,

Congress's powers under Section 5 of the Fourteenth Amendment supported the federal race-conscious measures in both *Fullilove*, 448 U.S. at 483-484 (opinion of Burger, C.J.), and *Metro Broadcasting*, 497 U.S. at 564-565, and similarly authorize the rebuttable presumption of disadvantage at issue in this case. "Congress, unlike any state or political subdivision, has a specific constitutional mandate to enforce the dictates of the Fourteenth Amendment. The power to 'enforce' may at times also include the power to define situations which *Congress* determines threaten principles of equality and to adopt prophylactic rules to deal with those situations." *Croson*, 488 U.S. at 490 (opinion of O'Connor, J.) (citing *Katzenbach* v. *Morgan*, 384 U.S. 641, 651 (1966)) ("Correctly viewed, § 5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment.")); see also *Fullilove*, 448 U.S. at 476 (opinion of Burger, C.J.). Because Congress in this area has constitutionally coordinate power to define racial inequality and to devise appropriate remedies, the Court must accord special respect to congressional judgment regarding both means and ends.

Congress's remedial powers under the Thirteenth Amendment similarly require deference to its identification of private discrimination and its choice of remedy. The enforcement clause of the Thirteenth Amendment is a source of uniquely federal power "to enact laws 'direct and primary, operating upon the acts of individuals, whether sanctioned by State legis-

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C.J., and White, J.). Judge Posner in *Milwaukee County Pavers Ass'n* v. *Fielder*, 922 F.2d 419, 423-424 (7th Cir.), cert. denied, 500 U.S. 954 (1991), articulated the same principle.

lation or not.'" *Runyon* v. *McCrary*, 427 U.S. 160, 179 (1976) (quoting *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 438 (1968)).

Petitioner errs in contending that Congress's Section 5 powers are not relevant here because this case "involves a federal program implemented by a federal agency" and "no state or local government is involved." Pet. Br. 33 n.29. The legacy of discrimination that Congress aimed to remedy in STURAA and the SBA is a history not only of private,[32] but also of state-sponsored discrimination.[33] Nothing in the Fourteenth Amendment requires that a federal remedy for such discrimination be *implemented* only through the States.[34] Congress's powers under the Thirteenth Amendment do not, in all events, turn on state responsibility for past and present racial discrimination.

2. *Intermediate scrutiny applies here.* It is thus "of overriding significance" to this case that the rebuttable presumption of disadvantage "ha[s] been

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[32] Discriminatory practices by prime contractors, banks, unions, vocational schools, and the like are among the practices Congress sought to redress by expressly recognizing racial minorities as disadvantaged in highway construction and devising measures to remedy disadvantage in federal contracting. Some illustrations of the bases for Congress's action are touched upon in Appendix B, and in the materials referred to therein.

[33] See, *e.g.*, *Minority Business Participation in Department of Transportation Project: Hearing Before a Subcomm. of the House Comm. on Government Operations*, 99th Cong., 1st Sess. 185 (1985); *1988 Barriers Hearing* 82, 117.

[34] Under STURAA, however, Congress in fact chose in large part to implement its remedial program through the States: The vast majority of the funds allocated under STURAA—approximately 98%—is for aid to the States, which is also spent subject to STURAA disadvantaged business enterprise contracting provisions.

specifically approved—indeed, mandated—by Congress." *Metro Broadcasting*, 497 U.S. at 563. Although agency regulations define some aspects of the rebuttable presumption, Congress made the "critical determinations." *Fullilove*, 448 U.S. at 468 (opinion of Burger, C.J.). Congress thus determined that persons who are "socially disadvantaged because of their identification as members of certain groups that have suffered the effects of discriminatory practices" "include, but are not limited to, Black Americans, Hispanic Americans, Native Americans, Indian tribes, Asian Pacific Americans, Native Hawaiian Organizations, and other minorities." 15 U.S.C. 631(f)(1)(B) and (C). It also determined that, in subcontracting, those minorities may be "presume[d]" to be disadvantaged. 15 U.S.C. 637(d)(3)(C) (Supp. V 1993). The Administration and DOT each elaborated on those determinations in their regulations by outlining evidence relevant to determinations of social and economic disadvantage, 13 C.F.R. 124.105-124.106; 49 C.F.R. Pt. 23, Subpt. D, App. C, and by spelling out the procedures available for rebutting the presumption, 13 C.F.R. Pt. 124, Subpt. B; 49 C.F.R. 23.69; 49 C.F.R. Pt. 23, Subpt. D, App. C. The role of the agencies in "flesh[ing] out this skeleton, pursuant to delegated rulemaking authority," does not make the crucial race-based, remedial determination any less the decision of Congress. *Fullilove*, 448 U.S. at 468 (opinion of Burger, C.J.).

The appropriate constitutional test for determining the validity of the rebuttable presumption of disadvantage is set forth in the plurality opinion of Chief Justice Burger in *Fullilove* and in the majority opinion in *Metro Broadcasting*. Relying on *Fullilove*, this Court in *Metro Broadcasting* held that "benign race-

conscious measures mandated by Congress * * * are constitutionally permissible to the extent that they serve important governmental objectives within the power of Congress and are substantially related to achievement of those objectives." *Metro Broadcasting*, 497 U.S. at 564-565. In a facial challenge such as is presented in this case, "given a reasonable construction and in light of its projected administration, if [the Court] find[s] the [minority business enterprise] program on its face to be free of constitutional defects, it must be upheld as within congressional power," *Fullilove*, 448 U.S. at 480-481 (opinion of Burger, C.J.). "[D]oubts must be resolved in support of the congressional judgment that this limited program is a necessary step to effectuate the constitutional mandate for equality of economic opportunity." *Id.* at 489.

Petitioner does not ask this Court to overrule *Fullilove*. Rather, it contends that Chief Justice Burger's opinion effectively applied strict scrutiny, and urges this Court to so hold. Pet. Br. 26-27; Pet. 7-11. But the Court observed in *Metro Broadcasting* that "[a] majority of the Court in *Fullilove* did not apply strict scrutiny to the race-based classification at issue," 497 U.S. at 564—an observation with which the dissenting Justices in that case agreed. See *id.* at 608 (O'Connor, J., dissenting) ("the Court correctly observes that a majority [in *Fullilove*] did not apply strict scrutiny"). In any event, whatever label is given to the degree of scrutiny employed in *Fullilove*, the result there requires validation of the presumption challenged here, which is as strongly justified and more narrowly tailored than the set-asides at issue in *Fullilove*.[36]

[36] Petitioner also does not question the validity of the Court's decision in *Metro Broadcasting*, but seeks to distinguish it as applicable only to non-remedial affirmative action in which First Amendment interests are at stake. Pet. Br. 28-31. Intermediate scrutiny applicable to a non-remedial race-conscious program, however, should, *a fortiori*, apply to a remedial program such as this one, given that the interest in remedying racial discrimination is the most compelling reason the Court has yet identified for race-based legislative distinctions. See *Metro Broadcasting*, 497 U.S. at 611 (O'Connor, J., dissenting). The First Amendment interests at stake in *Metro Broadcasting* did not contribute to the Court's view that a lesser level of scrutiny was required, but rather factored into the determination whether, under the intermediate test the Court employed, the government had established a sufficiently "important governmental objective[]." *Id.* at 565.

3. *Congress had a firm and compelling basis to act.* Although Congress "need not make specific findings of discrimination to engage in race-conscious relief," *Croson*, 488 U.S. at 489 (opinion of O'Connor, J.); see also *Fullilove*, 448 U.S. at 478 (opinion of Burger, C.J.), the presumption at issue here is in fact supported by explicit congressional findings that minorities are disadvantaged in participating in highway construction projects because of racial discrimination and its continuing effects. See pp. 7-12, *supra*; App., *infra*, 18a-34a. As it did in enacting the Public Works Employment Act of 1977 (PWEA) at issue in *Fullilove*, Congress in the SBA and STURAA sought to ensure that state and private entities receiving federal funds and contracts would not employ procurement practices that Congress had decided "might result in perpetuation of the effects of prior discrimination which had impaired or foreclosed access by minority businesses to public contracting opportunities." *Fullilove*, 448 U.S. at 473 (opinion of Burger, C.J.). Census data available to Congress further demonstrate that minorities in the construction industry, and in the economy generally,

have continued to lag far behind whites in securing economic opportunities. Appendix C to this brief sets forth census figures showing that, although there have been modest improvements in some respects since 1978, the participation of racial minority groups in the construction industry, and the economic benefit they derive from construction work they do, continue to lag far behind that of whites. Such data, as well as all legislative materials, are relevant to the determination that Congress was acting to remedy the effects of prior discrimination, since "Congress, of course, may legislate without compiling the kind of 'record' appropriate with respect to judicial or administrative proceedings." *Metro Broadcasting*, 497 U.S. at 572 (quoting *Fullilove*, 448 U.S. at 478 (opinion of Burger, C.J.)); see also *Metro Broadcasting*, 497 U.S. at 572 (quoting *Fullilove*, 448 U.S. at 502-503 (Powell, J., concurring)).

Congress may act broadly both in identifying discrimination and in fashioning a remedy for it.[36] In *Croson*, which concerned action taken by a city council, not Congress, the plurality rejected the appellee's view that "the city must limit any race-based remedial efforts to eradicating the effects of its own prior discrimination." 488 U.S. at 486 (opinion of O'Connor, J.). Congress may also act with the forward-looking goal of increasing opportunities for

[36] "Congress may identify and redress the effects of society-wide discrimination." *Croson*, 488 U.S. at 490 (opinion of O'Connor, J.); see also *Wygant* v. *Jackson Board of Education*, 476 U.S. 267, 287 (1986) (O'Connor, J., concurring in part and concurring in the judgment) ("a plan need not be limited to the remedying of specific instances of identified discrimination for it to be deemed sufficiently 'narrowly tailored,' or 'substantially related,' to the correction of prior discrimination by the state actor").

those who have been disadvantaged by racial discrimination. "A central purpose of the Fourteenth Amendment is to further the national goal of equal opportunity for all our citizens," but remedying past harms need not be done without "studying their probable impact on the future." *Croson*, 488 U.S. at 511 (Stevens, J., concurring in part and concurring in the judgment); see *Metro Broadcasting*, 497 U.S. at 601 (Stevens, J., concurring).

E. The Clause Is Narrowly Tailored To Achieve Congress's Constitutional Objectives

Although satisfaction of intermediate scrutiny is all that is required, the Subcontracting Compensation Clause is sufficiently narrowly tailored to satisfy even the most stringent constitutional scrutiny. Indeed, the use of the rebuttable presumption of disadvantage under the SBA, rather than a fixed set-aside for minorities, is the very program that the petitioners in *Fullilove* advocated as an acceptable, because "less onerous," alternative to the program they challenged in that case. Brief for Petitioner, General Building Contractors of New York State, Inc., at 30 (No. 78-1007). The *Fullilove* petitioners emphasized that SBA disadvantaged business certifications are not limited to minorities, but are "structured to assisting businesses of socially and economically disadvantaged individuals." *Ibid.* They favorably characterized the certification program in this case as "similar to the race-conscious approach taken by Harvard College in its admission program, which Justice Powell has found constitutional." *Id.* at 30 n.37 (citing *Regents of the University of California* v. *Bakke*, 438 U.S. 265, 316 (1978)).

1. *The Clause is not underinclusive.* The race-conscious affirmative measures this Court has previ-

ously approved, unlike the Clause at issue here, have not allowed minority business enterprises to participate. See, *e.g.*, *Metro Broadcasting*, 497 U.S. at 630 (O'Connor, J., dissenting) (opportunity to compete for licenses in distress sales "depends entirely upon race or ethnicity"). The criteria for qualification for disadvantaged status under the SBA and STURAA, in contrast, allow businesses owned by persons who are not members of minority groups to participate when they establish their social and economic disadvantage. 48 C.F.R. 19.703; 49 C.F.R. Pt. 23, Subpt. D., Apps. A and C.

2. *The Clause is not overinclusive.* At the same time, the Clause is not overinclusive, because it does not include all minority-owned businesses in its coverage, without regard to whether they have in fact suffered from social or economic disadvantage. In *Fullilove*, where all minority-owned contractors *were* included, the Court was satisfied that the 10% set-aside there was sufficiently tailored because the program included: (1) administrative scrutiny to weed out "minority-front entities," (i.e., businesses that purported to be owned and controlled by members of racial minority groups but that were in fact nonminority-owned and -controlled businesses), 448 U.S. at 487-488 (opinion of Burger, C.J.); (2) procedures for a prime contractor to obtain a waiver of the set-aside requirement in order to avoid dealing with a minority business that was "attempting to exploit the remedial aspects of the program by charging an unreasonable price, *i.e.*, a price not attributable to the present effects of past discrimination," *id.* at 488; and (3) procedures permitting the set-aside goals to be waived when the grantee could show that its "best efforts will not succeed or have not succeeded in achieving the statutory 10% target for minority

firm participation within the limitations of the program's remedial objectives," *ibid.* The Clause here is significantly more closely tailored to ensure that only disadvantaged minorities benefit from the subcontracting program.

The rebuttable presumption employed under the Clause is a fitting response to Congress's findings of competitive business disadvantage due to racial discrimination. The presumption responds to those findings in a manner designed effectively to ameliorate the insidious harms caused by racial discrimination, while neither limiting the remedy to race nor benefitting minorities who are not in fact disadvantaged. Congress recognized that the racial minorities to whom the presumption applies have been pervasively subjected to social and economic disadvantages—especially in the construction industry, where racial discrimination has been particularly virulent and tenacious—because of discrimination against them. The rebuttable presumption recognizes that it is factually accurate in most cases to presume that such disadvantage has affected a small minority subcontractor. By enacting a presumption, rather than a conclusive determination, Congress recognized the realities that not all minority group members have equally borne the brunt of racial discrimination and that other bias-related disadvantages may equally affect the ability of small businesses to compete for government contracts.

The use of the presumption thus operates to focus the inquiry on disadvantage by indicating a result in the absence of additional evidence. See *St. Mary's Honor Center* v. *Hicks*, 113 S. Ct. 2742 (1993). Such a presumption is valid if it rests on "a sound factual connection between the proved and inferred facts."

NLRB v. *Baptist Hospital, Inc.*, 442 U.S. 773, 787 (1979).[37] Chief Justice Burger in *Fullilove* found the minority business set-aside there adequately tailored precisely because it effectively operated as a presumption subject to rebuttal: Congress assumed that minority business enterprise prices would reflect the effects of discrimination, and that, in the absence of discrimination, minority participation in federal construction projects would be approximately 10%. Crucial to the finding of narrow tailoring, however, was that "each of these assumptions may be rebutted in the administrative process." *Fullilove*, 448 U.S. at 487 (opinion of Burger, C.J.); see *Croson*, 488 U.S. at 489 (opinion of O'Connor, J.) (noting with approval that, in *Fullilove*, both " 'assumptions' could be 'rebutted' by a grantee seeking a waiver of the 10% requirement"). Here, the very participation of a minority business enterprise in the program is subject to proof of actual disadvantage if the rebuttable presumption of disadvantage is brought into question.[38]

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[37] It is "only essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate." *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 28 (1976) (quoting *Mobile, J. & K.C.R.R.* v. *Turnispeed*, 219 U.S. 35, 43 (1910)). Because the "process of making the determination of rationality is, by its nature, highly empirical, * * * significant weight should be accorded the capacity of Congress to amass the stuff of actual experience and cull conclusions from it." *Ibid.* (quoting *United States* v. *Gainey*, 380 U.S. 63, 67 (1965)).

[38] The statutes and the regulations contain provisions more forceful and extensive than those in the program reviewed in *Fullilove* to prevent the minority presumption from being abused by nonminority, non-disadvantaged business "fronts" posing as disadvantaged businesses. See 15 U.S.C. 645(d) (providing that misrepresentations of disadvantaged status in order to obtain contracts are punishable by up to 10 years' imprisonment and/or $500,000 fine); 13 C.F.R. 124.5, 124.6, 124.103, 124.104, 124.108, 124.109; 49 C.F.R. Pt. 23, Subpt. D, App. C (other eligibility considerations, addressing requirement of ownership and control); 49 C.F.R. 23.51-23.53.

3. *The Clause does not involve a fixed quota or set-aside.* A third way in which the Clause is narrowly tailored is that it does not establish a racial set-aside or reflect any fixed or rigid racial quota. Specifically, the SBA's overall goals for the use of disadvantaged small businesses do not, contrary to petitioner's repeated contention (Pet. Br. 20, 47, 48), function as set-asides. They are benchmarks against which the procuring agencies, the Small Business Administration, Congress, and the President may measure the agencies' performances in contracting with those businesses. As petitioner itself explained in the court of appeals:

> The mere setting of a "goal" does no harm. This is because a goal, in and of itself, has no substantive effect. Constitutional problems arise only when a public entity grants a race-based preference to one class of persons in order to achieve a goal. Thus, the question of the means used to achieve a racial goal is entirely separate from the setting of the goal itself.

Adarand C.A. Br. 19.

Nor does the particular program challenged here —the Subcontracting Compensation Clause—establish any set-aside or percentage contracting requirement. Agreeing to subcontract with disadvantaged businesses is *not* a contractual condition of eligibility for award of the prime contract. Contractors are entirely free to contract with any subcontractor they

believe will best and most economically do the job. They are affirmatively encouraged to utilize and support disadvantaged businesses by the opportunity to recover the additional costs attending that use and support, but there are no sanctions or penalties if a prime contractor elects not to take advantage of that opportunity. Because prime contractors are not obligated to accept the lowest bidder on subcontracts, no "legitimate, firmly rooted expectation" is disturbed by the Clause. *Johnson* v. *Transportation Agency, Santa Clara County*, 480 U.S. 616, 638 (1987). Nor does it appear that a disproportionate number of subcontracts is directed toward disadvantaged subcontractors through use of the Clause. In fact, non-disadvantaged businesses obtain more than 95% of the subcontracting dollars on federal contracts.[39]

4. *The rebuttable presumption is of limited duration.* Finally, the rebuttable presumption applicable under the Subcontracting Compensation Clause is "appropriately limited in extent and duration," because the statutes that establish it are subject to regular "reassessment and reevaluation by the Congress." *Fullilove*, 448 U.S. at 489 (opinion of Burger, C.J.). STURAA, like the PWEA, is an appropriations measure of finite duration. The SBA, though of more permanent nature, is also subject to periodic and extensive congressional oversight. The SBA requires annual reporting to Congress and the President. 15 U.S.C. 631b, 644(h) (1988 & Supp. V 1993). Congress also frequently holds hearings on the operation of the SBA's disadvantaged business

[39] In Fiscal Year 1987, "only 3.1 percent of the federal procurement prime subcontracting awards were performed by minority businesses" and "only $1.5 billion in subcontracts were directed to minority firms out of a total of $63 billion." S. Rep. No. 394, 100th Cong., 2d Sess. 81, 82 (1988).

enterprise programs. See Appendix B, *infra*, 18a-36a. Congress closely follows the efforts of federal agencies to utilize disadvantaged businesses, and the SBA allows the goals to be set by the agencies at lower levels as circumstances warrant.

The high degree of congressional concern is a forceful indication that *under*-utilization of disadvantaged businesses is the acute social and economic problem facing the Nation; petitioner's claim that the program at issue here unfairly over-utilizes minority businesses finds no support in either the record or facts of this case or in the unusually extensive legislative record developed by a Congress deeply concerned with both economic development and racial justice. Congress can, moreover, confidently be expected to prevent any expansion of its programs that would give undue competitive advantages to disadvantaged businesses; such advantages would be entirely inconsistent with Congress's purposes to stimulate national economic activity and to improve the efficiency of federal procurement.

II. PRINCIPLES OF STARE DECISIS SUPPORT THE CONTINUING VITALITY OF *FULLILOVE* v. *KLUTZNICK*

This Court should not depart from the fundamental constitutional principle of *Fullilove* that Congress has unique powers to enact race-based remedies. That principle was reaffirmed in *Croson*.[40] No conflict has developed in the lower courts as to the proper interpretation or application of *Fullilove*. See,

[40] 488 U.S. at 490-491 (O'Connor, J., joined by Rehnquist, C.J., and White J.); *id.* at 521-522 (Scalia, J., concurring in the judgment); *id.* at 557-558 (Marshall, J., joined by Brennan and Blackmun, JJ., dissenting). See also *Metro Broadcasting*, 497 U.S. at 606-609 (O'Connor, J., dissenting); *id.* at 634 (Kennedy, J. dissenting).

e.g., *Harrison & Burrowes Bridge Constructors, Inc.* v. *Cuomo*, 981 F.2d 50, 57 (2d Cir. 1992); *Ellis* v. *Skinner*, 961 F.2d 912, 915 (10th Cir.), cert. denied, 113 S. Ct. 374 (1992); *Tennessee Asphalt Co.* v. *Farris*, 942 F.2d 969, 975 (6th Cir. 1991); *Milwaukee County Pavers Ass'n* v. *Fielder*, 922 F.2d 419, 423-424 (7th Cir.), cert. denied, 500 U.S. 954 (1991); see also *O'Donnell Construction Co.* v. *District of Columbia*, 963 F.2d 420, 423 (D.C. Cir. 1992); *id.* at 429 (Ginsburg, J., concurring). The central rule of *Fullilove* has in no way "been found unworkable," *Planned Parenthood* v. *Casey*, 112 S. Ct. 2791, 2809 (1992), and no new principle of law has called its correctness into question. This Court should continue to sustain Congress's vital role in remedying the effects of racial discrimination that continue to burden the Nation's economy and political life by reaffirming *Fullilove*.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX A

CONSTITUTIONAL PROVISIONS INVOLVED

1. The Spending Clause of the United States Constitution, Article I, Section 8, Clause 1, provides:

The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States.

2. The Commerce Clause of the United States Constitution, Article I, Section 8, Clause 3, provides:

The Congress shall have Power * * * To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

3. The Thirteenth Amendment to the United States Constitution provides:

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

4. The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

Section 1. * * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property,

without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * * * *

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

STATUTORY PROVISIONS INVOLVED

1. The Small Business Act, 15 U.S.C. 631 *et seq.* (1988 & Supp. V 1993), provides, in pertinent part:

§ 631. Declaration of policy

* * * * *

(f) Findings; purpose

(1) With respect to the Administration's business development programs the Congress finds—

(A) that the opportunity for full participation in our free enterprise system by socially and economically disadvantaged persons is essential if we are to obtain social and economic equality for such persons and improve the functioning of our national economy;

(B) that many such persons are socially disadvantaged because of their identification as members of certain groups that have suffered the effects of discriminatory practices or similar invidious circumstances over which they have no control;

(C) that such groups include, but are not limited to, Black Americans, Hispanic Americans, Native Americans, Indian tribes, Asian

Pacific Americans, Native Hawaiian Organizations, and other minorities;

(D) that it is in the national interest to expeditiously ameliorate the conditions of socially and economically disadvantaged groups;

(E) that such conditions can be improved by providing the maximum practicable opportunity for the development of small business concerns owned by members of socially and economically disadvantaged groups;

(F) that such development can be materially advanced through the procurement by the United States of articles, equipment, supplies, services, materials, and construction work from such concerns; and

(G) that such procurements also benefit the United States by encouraging the expansion of suppliers for such procurements, thereby encouraging competition among such suppliers and promoting economy in such procurements.

(2) It is therefore the purpose of section 637(a) of this title to—

(A) promote the business development of small business concerns owned and controlled by socially and economically disadvantaged individuals so that such concerns can compete on an equal basis in the American economy;

(B) promote the competitive viability of such concerns in the marketplace by providing such available contract, financial, technical, and management assistance as may be necessary; and

(C) clarify and expand the program for the procurement by the United States of articles, supplies, services, materials, and construction

work from small business concerns owned by socially and economically disadvantaged individuals.

* * * * *

§ 631b. Reports to Congress; state of small business

(a) Report on Small Business and Competition

The President shall transmit to the Congress not later than January 20 of each year a Report on Small Business and Competition which shall—

(1) examine the current role of small business in the economy on an industry-by-industry basis;

(2) present current and historical data on production, employment, investment, population, job creation and retention, annual business failures, annual business startups, and other economic variables for small business in the economy as a whole and for small business in each sector of the economy, with, to the extent practicable, specific statistics divided as to urban, suburban, and rural areas;

(3) identify economic trends which will or may affect the small business sector and the state of competition;

(4) examine the effects on small business and competition of policies, programs, and activities, including, but not limited to the Internal Revenue Code [26 U.S.C. 1 et seq.], the Employee Retirement Income Security Act [29 U.S.C. 1001 et seq.], the Securities Act of 1933 [15 U.S.C. 77a et seq.], and the Securities Exchange Act of 1934 [15 U.S.C. 78a et seq.], and regulations promulgated thereunder; identify problems generated by such policies, programs, and activities; and recommend legislative and administrative solutions to such problems; and

(5) recommend a program for carrying out the policy declared in section 631a of this title, together with such recommendations for legislation as he may deem necessary or desirable.

(b) Appendix to report

The President also shall transmit simultaneously as an appendix to such annual report, a report, by agency and department, on the total dollar value of all Federal contracts exceeding $10,000 in amount and the dollar amount (including the subcontracts thereunder in excess of $10,000) awarded to small, minority-owned and female-owned business.

* * * * *

* * * * *

(e) Small business concerns owned by disadvantaged individuals and by women

The information and data required to be reported pursuant to subsection (a) of this section shall separately detail those portions of such information and data that are relevant to—

(1) small business concerns owned and controlled by socially and economically disadvantaged individuals, by gender, as defined pursuant to section 637(d) of this title; and

(2) small business concerns owned and controlled by women.

* * * * *

§ 637. Additional powers

(a) Procurement contracts; subcontracts to disadvantaged small business concerns; performance bonds; contract negotiations; definitions; eligibility; determinations; publication; recruitment; construction subcontracts; annual estimates; Indian tribes

* * * * *

(4)(A) For purposes of this section, the term "socially and economically disadvantaged small business concern" means any small business concern which meets the requirements of subparagraph (B) and—

(i) which is at least 51 per centum unconditionally owned by—

(I) one or more socially and economically disadvantaged individuals,

(II) an economically disadvantaged Indian tribe (or a wholly owned business entity of such tribe), or

(III) an economically disadvantaged Native Hawaiian organization, or

(ii) in the case of any publicly owned business, at least 51 per centum of the stock of which is unconditionally owned by—

(I) one or more socially and economically disadvantaged individuals,

(II) an economically disadvantaged Indian tribe (or a wholly owned business entity of such tribe),

(III) an economically disadvantaged Native Hawaiian organization.

(B) A small business concern meets the requirements of this subparagraph if the management and daily business operations of such small business concern are controlled by one or more—

(i) socially and economically disadvantaged individuals described in subparagraph (A)(i)(I) or subparagraph (A)(ii)(I),

(ii) members of an economically disadvantaged Indian tribe described in subparagraph (A)(i)(II) or subparagraph (A)(ii)(II), or

(iii) Native Hawaiian organizations described in subparagraph (A)(i)(III) or subparagraph (A)(ii)(III).

(C) Each Program Participant shall certify, on an annual basis, that it meets the requirements of this paragraph regarding ownership and control.

(5) Socially disadvantaged individuals are those who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities.

(6)(A) Economically disadvantaged individuals are those socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged. In determining the degree of diminished credit and capital opportunities the Administration shall consider, but not be limited to, the assets and net worth of such socially disadvantaged individual. In determin-

ing the economic disadvantage of an Indian tribe, the Administration shall consider, where available, information such as the following: the per capita income of members of the tribe excluding judgment awards, the percentage of the local Indian population below the poverty level, and the tribe's access to capital markets.

(B) Each Program Participant shall annually submit to the Administration—

(i) a personal financial statement for each disadvantaged owner;

(ii) a record of all payments made by the Program Participant to each of its disadvantaged owners or to any person or entity affiliated with such owners; and

(iii) such other information as the Administration may deem necessary to make the determination required by this paragraph.

(C)(i) Whenever, on the basis of information provided by a Program Participant pursuant to subparagraph (B) or otherwise, the Administration has reason to believe that the standards to establish economic disadvantage pursuant to subparagraph (A) have not been met, the Administration shall conduct a review to determine whether such Program Participant and its disadvantaged owners continue to be impaired in their ability to compete in the free enterprise system due to diminished capital and credit opportunities when compared to other concerns in the same business area, which are not socially disadvantaged.

(ii) If the Administration determines, pursuant to such review, that a Program Participant and its disadvantaged owners are no longer economically disadvantaged for the purpose of receiving assistance under this subsection, the Program Participant shall be graduated pursuant to section 636(j)(10)(G) of this title subject to the right to a hearing as provided for under paragraph (9).

* * * * *

(d) Performance of contracts by small business concerns; inclusion of required contract clause; subcontracting plans; contract eligibility; incentives; breach of contract; review; report to Congress

(1) It is the policy of the United States that small business concerns, and small business concerns owned and controlled by socially and economically disadvantaged individuals, shall have the maximum practicable opportunity to participate in the performance of contracts let by any Federal agency, including contracts and subcontracts for subsystems, assemblies, components, and related services for major systems. It is further the policy of the United States that its prime contractors establish procedures to ensure the timely payment of amounts due pursuant to the terms of their subcontracts with small business concerns and small business concerns owned and controlled by socially and economically disadvantaged individuals.

(2) The clause stated in paragraph (3) shall be included in all contracts let by any Federal agency except any contract which—

(A) does not exceed the small purchase threshold;

(B) including all subcontracts under such contracts will be performed entirely outside of any State, territory, or possession of the United States, the District of Columbia, or the Commonwealth of Puerto Rico; or

(C) is for services which are personal in nature.

(3) The clause required by paragraph (2) shall be as follows:

"(A) It is the policy of the United States that small business concerns and small business concerns owned and controlled by socially and economically disadvantaged individuals shall have the maximum practicable opportunity to participate in the performance of contracts let by any Federal agency, including contracts and subcontracts for subsystems, assemblies, components, and related services for major systems. It is further the policy of the United States that its prime contractors establish procedures to ensure the timely payment of amounts due pursuant to the terms of their subcontracts with small business concerns and small business concerns owned and controlled by socially and economically disadvantaged individuals.

"(B) The contractor hereby agrees to carry out this policy in the awarding of subcontracts to the fullest extent consistent with the efficient performance of this contract. The contractor further agrees to cooperate in any studies or surveys as may be conducted by the United States Small Business Administration or the awarding

agency of the United States as may be necessary to determine the extent of the contractor's compliance with this clause.

"(C) As used in this contract, the term 'small business concern' shall mean a small business as defined pursuant to section 3 of the Small Business Act [15 U.S.C. 632] and relevant regulations promulgated pursuant thereto. The term 'small business concern owned and controlled by socially and economically disadvantaged individuals' shall mean a small business concern—

"(i) which is at least 51 per centum owned by one or more socially and economically disadvantaged individuals; or, in the case of any publicly owned business, at least 51 per centum of the stock of which is owned by one or more socially and economically disadvantaged individuals; and

"(ii) whose management and daily business operations are controlled by one or more of such individuals.

"The contractor shall presume that socially and economically disadvantaged individuals include Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities, or any other individual found to be disadvantaged by the Administration pursuant to section 8(a) of the Small Business Act [15 U.S.C. 637(a)].

"(D) Contractors acting in good faith may rely on written representations by their subcontractors regarding their status as either a small business concern or a small business concern

owned and controlled by socially and economically disadvantaged individuals."

• • • • •

§ 644. Awards or contracts

• • • • •

(g) Goals for participation of small business concerns in procurement contracts

(1) The President shall annually establish Government-wide goals for procurement contracts awarded to small business concerns and small business concerns owned and controlled by socially and economically disadvantaged individuals. The Government-wide goal for participation by small business concerns shall be established at not less than 20 percent of the total value of all prime contract awards for each fiscal year. The Government-wide goal for participation by small business concerns owned and controlled by socially and economically disadvantaged individuals shall be established at not less than 5 percent of the total value of all prime contract and subcontract awards for each fiscal year. Notwithstanding the Government-wide goal, each agency shall have an annual goal that presents, for that agency, the maximum practicable opportunity for small business concerns and small business concerns owned and controlled by socially and economically disadvantaged individuals to participate in the performance of contracts let by such agency. The Administration and the Administrator of the Office of Federal Procurement Policy shall, when exercising their authority pursuant to paragraph (2), insure that the cumulative annual prime contract goals for all agencies meet or exceed the annual Government-

wide prime contract goal established by the President pursuant to this paragraph.

(2) The head of each Federal agency shall, after consultation with the Administration, establish goals for the participation by small business concerns, and by small business concerns owned and controlled by socially and economically disadvantaged individuals, in procurement contracts of such agency. Goals established under this subsection shall be jointly established by the Administration and the head of each Federal agency and shall realistically reflect the potential of small business concerns and small business concerns owned and controlled by socially and economically disadvantaged individuals to perform such contracts and to perform subcontracts under such contracts. Whenever the Administration and the head of any Federal agency fail to agree on established goals, the disagreement shall be submitted to the Administrator of the Office of Federal Procurement Policy for final determination. For the purpose of establishing goals under this subsection, the head of each Federal agency shall make consistent efforts to annually expand participation by small business concerns from each industry category in procurement contracts of the agency, including participation by small business concerns owned and controlled by socially and economically disadvantaged individuals. The head of each Federal agency, in attempting to attain such participation, shall consider—

(A) contracts awarded as the result of unrestricted competition; and

(B) contracts awarded after competition restricted to eligible small business concerns under

this section and under the program established under section 637(a) of this title.

(h) Reports to Administration; submittal of information to Congress

(1) At the conclusion of each fiscal year, the head of each Federal agency shall report to the Administration on the extent of participation by small business concerns and small business concerns owned and controlled by socially and economically disadvantaged individuals in procurement contracts of such agency. Such reports shall contain appropriate justifications for failure to meet the goals established under subsection (g) of this section.

(2) The Administration shall annually compile and analyze the reports submitted by the individual agencies pursuant to paragraph (1) and shall submit them to the President. The Administration's submission to the President shall include the following:

(A) The Government-wide goals for participation by small business concerns and small business concerns owned and controlled by socially and economically disadvantaged individuals and the performance in attaining such goals.

(B) The goals in effect for each agency and the agency's performance in attaining such goals.

(C) An analysis of any failure to achieve the Government-wide goals or any individual agency goals and the actions planned by such agency (and approved by the Administration) to achieve the goals in the succeeding fiscal year.

(D) The number and dollar value of contracts awarded to small business concerns and small business concerns owned and controlled by socially and economically disadvantaged individuals through—

(i) noncompetitive negotiation,

(ii) competition restricted to small business concerns owned and controlled by socially and economically disadvantaged individuals,

(iii) competition restricted to small business concerns, and

(iv) unrestricted competitions,

for each agency and on a Government-wide basis.

(E) The number and dollar value of subcontracts awarded to small business concerns and small business concerns owned and controlled by socially and economically disadvantaged individuals.

(F) The number and dollar value of prime contracts and subcontracts awarded to women-owned small business enterprises.

(3) The President shall include the information required by paragraph (2) in each annual report to the Congress on the state of small business prepared pursuant to section 631b(a) of this title.

* * * * *

2. Section 106 of the Surface Transportation and Uniform Relocation Assistance Act of 1987, Pub. L.

No. 100-17, 101 Stat. 144-146, provides, in pertinent part:

SEC. 106. AUTHORIZATION OF APPROPRIATIONS.

(a) From the Highway Trust Fund.—For the purpose of carrying out the provisions of title 23, United States Code, the following sums are hereby authorized to be appropriated out of the Highway Trust Fund (other than the Mass Transit Account):

* * * * *

(8) **Forest highways.**—For forest highways $55,000,000 per fiscal year for each fiscal years 1987, 1988, 1989, 1990, and 1991.

* * * * *

(c) Disadvantaged Business Enterprises.—

(1) **General rule.**—Except to the extent that the Secretary determines otherwise, not less than 10 percent of the amounts authorized to be appropriated under titles I and III of this Act or obligated under titles I, II, and III (other than section 203) of the Surface Transportation Assistance Act of 1982 after the date of the enactment of this Act shall be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals.

(2) **Definitions.**—For purposes of this subsection—

(A) **Small business concern.**—The term "small business concern" has the meaning such term has under section 3 of the Small Business Act (15 U.S.C. 632); except that such term shall not include any concern or group of concerns controlled by the same

socially and economically disadvantaged individual or individuals which has average annual gross receipts over the preceding 3 fiscal years in excess of $14,000,000, as adjusted by the Secretary for inflation.

(B) **Socially and economically disadvantaged individuals.**—The term "socially and economically disadvantaged individuals" has the meaning such term has under section 8(d) of the Small Business Act (15 U.S.C. 637(d)) and relevant subcontracting regulations promulgated pursuant thereto; except that women shall be presumed to be socially and economically disadvantaged individuals for purposes of this subsection.

(3) **Annual listing of disadvantaged business enterprises.**—Each State shall annually survey and compile a list of the small business concerns referred to in paragraph (1) and the location of such concerns in the State.

(4) **Uniform certification.**—The Secretary shall establish minimum uniform criteria for State governments to use in certifying whether a concern qualifies for purposes of this subsection. Such minimum uniform criteria shall include but not be limited to on-site visits, personal interviews, licenses, analysis of stock ownership, listing of equipment, analysis of bonding capacity, listing of work completed, résumé of principal owners, financial capacity, and type of work performed.

(5) **Applicability.**—Section 105(f) of the Surface Transportation Assistance Act of 1982 shall not apply to amounts authorized under such Act and obligated after the date of the enactment of this Act.

APPENDIX B

Statements in Congress Regarding Racial Discrimination and its Effects on Minority Business Enterprises

The following remarks by Members of Congress and industry experts in testimony received in hearings before congressional committees are relevant to our submission that, in enacting the disadvantaged business enterprise (DBE) provisions in the Small Business Act (SBA) and the Surface Transportation and Uniform Relocation Assistance Act of 1987 (STURAA), Congress was seeking, among other things, to remedy the effects of discrimination against minorities. Before Congress enacted the laws at issue here, and throughout the period they have been in place, Congress has repeatedly considered testimony on both sides of the debate about whether race-conscious remedial measures are needed.

The following are illustrative statements in support of the measures:

1. When Congress in 1978 debated amending the SBA to add findings of the disadvantage suffered by racial minorities, it considered the effects of racial discrimination on minority participation in public contracting.

Following the introduction of the Conference Report to the Senate, Senator Weicker stated:

> The pattern of social and economic discrimination that continues to deprive racial and ethnic minorities of the opportunity to participate fully in the free enterprise system is recognized.

124 Cong. Rec. 35,204 (1978). See also *id.* at 29,637 (remarks of Sen. Weicker) ("This legislation recognizes the pattern of social and economic discrimination that continues to deprive racial and ethnic minorities of the opportunity to participate fully in the free enterprise system."); see *id.* at 24,021 (remarks of Rep. Mitchell) ("The promises of equality for minorities are inanitions.").[1]

Senator Dole argued for the passage of the Minority Business Development and Assistance Act of 1977 (amending the SBA), stating that the "underlying rationale" of the bill "is that minority businessmen can compete equally when given an equal opportunity. One of the most important steps this country can take to insure equal opportunity for its hispanic, black and other minority citizens is to involve them in the mainstream of our free enterprise system." 124 Cong. Rec. 7681 (1978).

This Court, in upholding the minority set-asides in the Public Works Employment Act of 1977 in *Fullilove* v. *Klutznick*, 448 U.S. 448 (1980), relied substantially on the findings of discrimination supporting the 1978 SBA Amendments at issue here. See 448 U.S. at 460, 463-468 (opinion of Burger, C.J.). Chief Justice Burger relied on a report of the Committee on Small Business that summarized the Committee's ongoing activities in the period leading up to the 1978 SBA Amendments, see H.R. Rep. No. 1791, 94th Cong., 2d Sess. (1977). He also quoted from a report of the Subcommittee on SBA Oversight and Minority Enterprise of the House Committee on Small Business referred to therein, see H.R. Rep. No. 468, 94th Cong., 1st Sess. (1975), which concluded:

> The effects of past inequities stemming from racial prejudice have not remained in the past.

---

[1] See generally 124 Cong. Rec. 321-323 (1978) (statements of Sen. Brooke on the state of minority businesses).

> The Congress has recognized the reality that past discriminatory practices have, to some degree, adversely affected our economic system.

Id. at 1-2. See also *Fullilove*, 448 U.S. at 466-468 (opinion of Burger, C.J.) (referring to other reports making findings of discrimination that were considered by Congress shortly before the SBA Amendments).

2. In 1980, the Senate Select Committee on Small Business held a hearing on legislation to amend provisions of the SBA that pertain to the Section 8(a) program. *H.R. 5612, To Amend the Small Business Act to Extend the Current SBA 8(a) Pilot Program: Hearing on H.R. 5612 Before the Senate Select Comm. on Small Business*, 96th Cong., 2d Sess. (1980) [hereinafter *1980 SBA 8(a) Pilot Program Hearing*]. Witnesses presented evidence that the effects of discrimination continued to depress the percentage of construction dollars going to minority-owned firms. *Id.* at 16-17. The Committee received testimony that minority-owned construction firms generated approximately $3 billion in gross receipts, in comparison with the total $200 billion generated by all construction firms. According to the testimony, if minority-owned firms had performed as actively as nonminority-owned firms, the gross receipts for the minority-owned firms would have been closer to $30 billion *Ibid.* Witnesses also described the ongoing effects of discrimination faced by minority-owned firms in getting subcontracts, even on Section 8(a) projects. See *id.* at 19-23.

In 1981, the House Committee on Small Business held hearings, see *Small and Minority Business in the Decade of the 1980's (Part 1): Hearings Before the*

House Comm. on Small Business, 97th Cong., 1st Sess. (1981), in which the Committee heard evidence concerning problems experienced by small and minority-owned firms that prevented them from becoming viable, competitive businesses. Those problems included: (1) difficulties getting bonding for construction projects, *id.* at 10, securing adequate financing and credit terms, *id.* at 33-34, 220, and getting prompt payment from prime contractors for work completed, *id.* at 65; (2) the impact of the negative perception by the public and private sectors as to the skills and competence of minority and disadvantaged businesses, *id.* at 106, 221; and (3) criticism that federal agencies were not fully promoting the utilization of minority and disadvantaged subcontractors by prime contractors, *id.* at 114, 118, 120, 241. The problems were attributed in part to racial discrimination. *Id.* at 4 ("racism and other barriers to the free enterprise system have placed a heavier burden on the development and maturity of minority businesses").

3. Section 106(c) of STURAA, enacted in 1987, was preceded by a similar provision, Section 105(f) of the Surface Transportation Assistance Act (STAA). Section 105(f) was originally introduced as an amendment to STAA by Representative Mitchell, who intended the amendment to ensure "the participation of [disadvantaged] businesses in these massive public spendings." 128 Cong. Rec. 28,927 (1982). Representative Mitchell expressed concern about the "disproportionate unemployment enjoyed by minorities," and his fear that, without Section 105(f), "the twin forces of racism and economic discrimination will once again raise their ugly heads" and exclude blacks and other minorities from the

"employment rejuvenation program" contemplated by STAA. *Ibid.*

4. Both the Section 8(a) program and Section 105(f) received close congressional scrutiny throughout the 1980's. Numerous congressional hearings were conducted where the success and continued viability of both the Section 8(a) program and Section 105(f) were debated. In those hearings, testimony was presented documenting the current discrimination that frustrated minority small businesses generally, and highway contractors specifically, seeking to compete equally. For instance, at a hearing in 1985 to determine whether the DBE provision of STAA should be included in STURAA, Representative Mitchell stated that "[w]hen this Nation advances to what I think it ought to be, then there will be no need for this kind of effort. But until we get there, there is a demonstrable need for [Section] 105(f) or something similar to it in terms of preferential treatment." *The Disadvantaged Business Enterprise Program of the Federal-Aid Highway Act: Hearing Before the Subcomm. on Transportation of the Senate Comm. on Environment and Public Works*, 99th Cong., 1st Sess. 10 (1985) [hereinafter *1985 DBE Hearing*].

In prepared testimony at that hearing, Roberto Rohas, National Executive Director of the National Hispanic Association of Construction Enterprises, stated that if prime contractors "used 'good faith' efforts in utilizing [the services of Hispanic contractors], hearings such as these would become a thing of the past." *1985 DBE Hearing* 221.

James K. Laducer, Director of the North Dakota Minority Business Enterprise Programs, United Tribes Educational Technical Center, noted in written

testimony that local banks "refuse to lend monies to minority businesses from nearby Indian communities" because "Bankers tend to view lending capital to such businesses as potentially harmful to 'their own' small businesses and local economic base." *1985 DBE Hearing* 363.

Also in 1985, a Subcommittee of the House Committee on Government Operations conducted a hearing in which testimony was received documenting racial discrimination in the transportation construction industry, which hindered the effectiveness of STAA and prevented minority firms from entering the economic mainstream. For instance, James Haughton, President of Fight Back, commented on the highway construction industry in New York, stating that there was "unbridled racism in the construction industry. As you well know, it is not something recent, it's the history of this industry and sorry to say over the years conditions have not improved for black people, Hispanic people, and women. Indeed, the conditions have gotten much worse." *Minority Business Participation in Department of Transportation Project: Hearing Before a Subcomm. of the House Comm. on Government Operations*, 99th Cong., 1st Sess. 179 (1985) [hereinafter *1985 Transportation Hearing*]. He later remarked that to obtain a construction contract in New York, a contractor must contract with a union, and "I have known contractors who have suffered very heavily because they have been victims to that discrimination as practiced by the unions." *Id.* at 201.

At that same hearing, R.E. Castro, a small businessman, testified about problems faced by minority firms in the transportation construction industry as a result of racial discrimination. *1985 Transportation Hearing*

197. He then remarked that "it is impossible to legislate people's attitudes of responsibilities," but "[i]t seems to me that unless we take effective action to ensure that equal access to economic opportunity becomes a reality in this country, we might as well take the Constitution and put it aside because the equal protection provision of the Constitution will never be lived up to." *Id.* at 198.

In hearings concerning preservation of the Section 8(a) program, testimony was presented that discrimination had hindered the ability of minority members to compete in business, and that the Section 8(a) program helps remedy that discrimination. Representative Conyers remarked: "The fact in American life is that blacks have been cut out of business. We are not doing them a favor by creating these programs. They are created out of an experienced need. So, I am more concerned about getting a level playing field and that is what we have been trying to redress for so long." *A Bill to Reform the Capital Ownership Development Program: Hearings on H.R. 1807 Before the Subcomm. on Procurement, Innovation, and Minority Enterprise Development of the House Comm. on Small Business*, 100th Cong., 1st Sess. 14 (1987) [hereinafter *1987 Capital Ownership Hearings*].

At those hearings, Representative Mfume stated:

> [I]n the area of civil rights—and particularly in the area of discrimination—the existence of the protections does not insure that the protections are, in fact, enforced. * * * And that has been strikingly absent from much of the civil rights legislation and protection programs that have been instituted by this Nation.

> * * * I am concerned about the enforcement, and I think this program goes a long way in making sure that some of the things that are supposed to happen do, in fact, take place.

1987 Capital Ownership Hearings 22.

Former Representative Parren Mitchell, Chairman of the Minority Business Enterprise Legal Defense and Education Fund, Inc., also testified:

> A part of my concern is that I think that there is an antiblack, antipoor, anti-Hispanic, anti-minority attitude developing in this country. I see it as I travel around the country. I see its manifestations. Therefore, I assume that a part of the attacks on the Federal effort on behalf of minority businesses, a part of those attacks are reflective of the resurgence of racism in this Nation, which is a very troublesome thing to me.

1987 Capital Ownership Hearings 32-33. Mitchell described the problems faced by minority-owned businesses as a result of discrimination:

> The hard fact of the matter is that the majority firms that are trying to do something to incorporate minority businesses admit openly and publicly that their own membership is reluctant to do business. * * * There are a dozen of them in various States who will work on behalf of minorities. But they will be the first to say, "I cannot get the other guys whose names are on the letterhead to do business with minority firms."
>
> Why is that? * * * First, the "old boy" network. * * *

* * * * *

> The other real significant thing in that private sector, and people do not like to hear talk like this, but that private sector is not immune to the resurgence of racism that is taking place in this country. * * * You get it in the private sector and you get it in Government where the festering of racism immediately establishes attitudes which are against those of us who are black, or brown, or the minorities.

Id. at 34.

Finally, at those same hearings, Edward Irons, Acting Superintendent of the Office of Banking and Financial Institutions for the District of Columbia, testified that "the evidence of racism is irrefutable in the business arena" and hinders opportunities for minorities. *1987 Capital Ownership Hearings* 593.

In hearings preceding the 1988 amendment to Section 8(a), Parren Mitchell testified that "[t]he harsh reality is that in the private sector, there is a wall that is set up, there is an institutional network, there is an old-boy network, that makes it exceedingly difficult for minority firms to break into the private commercial sector." *Minority Business Development Program Reform Act of 1987: Hearings on S. 1993 and H.R. 1807 Before the Senate Comm. on Small Business*, 100th Cong., 2d Sess. 127 (1988). In those hearings, Senator Levin urged reauthorization of the Section 8(a) program, stating that the program "gives important business opportunities to members of our society who have been denied such opportunities for too long." *Id.* at 189.

Hamilton Bowser, of Evanbow Construction Co., testified during a hearing on the problems of minority contractors in obtaining surety bonds that "[w]e know that our minority contractors have been cut

out of entering the bond market with this, the biases that are developed. * * * It is our guess that less than one-tenth of 1 percent of bonding issued by the surety companies in America go[es] to minority firms." *Surety Bonds and Minority Contractors: Hearing Before the Subcomm. on Commerce, Consumer Protection, and Competitiveness of the House Comm. on Energy and Commerce*, 100th Cong., 2d Sess. 6 (1988).

Representative Hastert testified during a hearing that "[t]he DBE program is * * * an admission of sorts that minority and women-owned businesses have been treated unfairly in the past." *Barriers to Full Minority Participation in Federally Funded Highway Construction Projects: Hearing Before a Subcomm. of the House Comm. on Government Operations*, 100th Cong., 2d Sess. 3 (1988). Representative Hastert noted that "[t]he DBE program * * * provides businesses which previously found it difficult to effectively compete for federally aided highway contracts with the opportunity to at least get their foot in the door." *Ibid.*

During hearings on DBE participation in transportation construction projects, Joann Payne, President of PSM Consultants, noted that, "[h]istorically, minorities and women-owned businesses have had a difficult time competing fairly in the highway construction industry. * * * [B]ecause of the ethnic and sex discrimination practiced by lending institutions, it was very difficult for minorities and women to secure bank loans, and bonding insurance." *Disadvantaged Business Set-Asides in Transportation Construction Projects: Hearings Before the Subcomm. on Procurement, Innovation, and Minority Enterprise Development of the House Comm. on Small B[illegible].*

100th Cong., 2d Sess. 25-26 (1988) [hereinafter *1988 DBE Transportation Construction Hearings*].

At the same hearing, Carolyn Jordan, Board Member of the Illinois Association of Black Women Business Owners, testified that, "[b]asically, the system discriminates, and the people that implement the system condone a system that allows only white males and white females the opportunity to work and earn a living while the black and minority women sit back and get more and more frustrated * * *. The intent of the law * * * is to maximize participation of minorities and women in an industry that has been dominated by men and to prevent discrimination." *1988 DBE Transportation Construction Hearings* 96-98.[2]

Representative Savage, then-Chairman of the Subcommittee on Economic Development of the House Committee on Public Works and Transportation, testified about racial discrimination in the industry:

> Now, let me * * * explain the specific problem which concerns this subcommittee. * * * It is simply this: Because of historically and often

[2] See also *1988 DBE Transportation Construction Hearings* 61-62 (testimony of Patricia Low, President of PAL Industries, Inc.) ("I believe that there has been discrimination against minorities and women in the industry"); *id.* at 69-70 (testimony of Low); *id.* at 87 (testimony of Cleve Chapman, President of Midwest Contractors for Progress); *id.* at 107 (testimony of Marjorie Herter, National President of the Women Construction Owners and Executives, USA) ("Discrimination against women and minorities in the bonding market is quite prevalent."); *id.* at 107-109 (testimony of Glendis Hambrick, of the Chicago Chapter of the Coalition of Black Trade Unionists).

> legally imposed disadvantages, it has been deemed by the U.S. Congress and the U.S. Supreme Court that certain minorities * * * have been denied equal opportunity for employment, promotions, and contracts by Government and private business.
>
> Present evidence of these disadvantages are found in the following sampling of statistics. For 1987, * * * the unemployment rate for white males and females was only about 5.3 percent, but for Hispanics, it was 8.8 percent and for blacks, it was 13 percent * * *.
>
> In 1986, 27.3 percent of Hispanics and 31.1 percent of blacks suffered incomes below the poverty level, nearly 3 times the rate for whites.

1988 DBE Transportation Construction Hearings 112.

Representative Savage added that both the Section 8(a) program and the DBE provision of STURAA attempt to remedy the specific disadvantages caused by discrimination in small businesses and in the highway construction industry. *Id.* at 112-113. Representative Savage later stated that discrimination in the highway construction industry is evidenced by the fact that the federal government has never "contracted anywhere close to fairly with minorities and the figures show it." *Id.* at 120.[3]

[3] Numerous other hearings conducted between 1980 and 1988 further demonstrate the close congressional scrutiny of both Section 105(f) and the Section 8(a) program. See, *e.g.*, *1980 SBA 8(a) Pilot Program Hearing, supra; Minority Business and Its Contributions to the U.S. Economy: Hearing Before the Senate Comm. on Small Business*, 97th Cong., 2d Sess. (1982); *Federal Contracting Opportunities for Minority and Women-Owned Businesses—An Examination of the 8(d) Subcontracting Program: Hearings Before the Senate Comm.*

5. In response to the continued existence of discrimination and its harmful effects on minority businesses generally, and minority businesses in the construction industry specifically, Congress has repeatedly chosen to retain the Section 8(a) program in the SBA and the DBE set-aside provision of STURAA.

a. In the 100th Congress, H.R. 1807 was introduced to amend Section 8(a). Following the introduction of H.R. 1807 in the House of Representatives, Representative Conte quoted from the 1987 report of the President on the state of small business, which stated that minorities represented 20% of the population, but only 1.8% of the minority-owned businesses, compared to 6.4% of nonminorities. 133 Cong. Rec. 33,318 (1987). Among minority-owned businesses, 94% were sole proprietorships, compared to 69%

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on Small Business, 98th Cong., 1st Sess. (1983); *Women Entrepreneurs—Their Success and Problems: Hearing Before the Senate Comm. on Small Business*, 98th Cong., 2d Sess. (1984); *State of Hispanic Small Business in America: Hearing Before the Subcomm. on SBA and SBIC Authority, Minority Enterprise, and General Small Business Problems of the House Comm. on Small Business*, 99th Cong., 1st Sess. (1985); *Minority Enterprise and General Small Business Problems: Hearing Before the Subcomm. on SBA and SBIC Authority, Minority Enterprise and General Small Business Problems of the House Comm. on Small Business*, 99th Cong., 2d Sess. (1986); *To Present and Examine the Result of a Survey of the Graduates of the Small Business Administration Section 8(a) Minority Business Development Program: Hearing Before the Senate Comm. on Small Business*, 100th Cong., 1st Sess. (1987); *The Small Business Competitiveness Demonstration Program Act of 1988: Hearing on S. 1559 Before the Senate Comm. on Small Business*, 100th Cong., 2d Sess. (1988).

of all businesses. *Ibid.* Representative Conte indicated that discrimination was the cause of these deficiencies, *ibid.*, and urged passage of the bill:

> Mr. Speaker, we have a chance to make history today. In doing so we can address programmatic failures and shortcomings of the 8(a) program and create a workable mechanism to finally redress past discriminatory practices.

Id. at 33,320.

Representative Conyers also spoke in support of the bill. He, too, cited statistics indicating that the "struggle" for "economic empowerment" for minority businesses was not yet complete. 133 Cong. Rec. 33,321 (1987). Representative Conyers stated:

> Two-thirds of all black firms earn less than $10,000 annually, and one-third of Hispanic firms gross less than $5,000 annually. In addition receipts from black firms are only 0.16 percent of all business receipts in this country. The 8(a) program, which enabled minority businesses to perform more than $1 billion in Federal contracts last year, is an essential step in overcoming the appalling circumstances which continue to plague minority Americans and in achieving parity and growth in the minority business community.

Ibid.

Additionally, during the introduction of H.R. 1769, the Minority Business Development Act of 1988 (amending Section 8(a)), Representative Mfume stated that "[w]e know that over the years blacks and other racial and ethnic minorities have suffered

the effects of racial discrimination, discrimination which has impaired the ability of many within the minority business community to be able to access resources and markets that have been essential to economic viability." 134 Cong. Rec. 30,078-30,079 (1988). In speaking about the Act, Representative Mfume stated:

> [D]iscrimination * * * has moved to impair the ability of the minority business community to access resources and markets essential to economic viability. * * *
>
> Today as we ask the question whether or not there remains a compelling need for special Federal programs to provide socially and economically disadvantaged persons with the opportunity * * * for full participation in our free enterprise system, the answer unfortunately remains a resounding yes. The need to devote Federal resources to assist minority businesses in overcoming economic disadvantages is no less apparent today.

Id. at 16,584.

b. In the Senate, S. 1993 was introduced as the companion bill to H.R. 1807. During the introduction of the bill, Senator Bumpers noted that "[o]nly 1.8 percent of all minorities have been financially able to start firms, and well over 94 percent of such businesses are sole proprietorships. They continue to face discrimination in access to credit and markets. Therefore, the restricted resources with which these firms must deal have stagnated economic expansion in many areas." 133 Cong. Rec. 37,814 (1987).

Senator Weicker recited the benefits of the bill and stated that, "[a]lthough remnants of discrimination

remain in this society as well as other economic or financial barriers which minority entrepreneurs must face, many are making it, who might not have, without the 8(a) program." 133 Cong. Rec. 37,821 (1987).

Senator Kerry also spoke in support of the program, stating:

> It is my belief that one of the most important missions of the Small Business Administration is to help members of disadvantaged and minority groups and others who suffer from social and economic discrimination in our society to participate in the great American tradition of starting and owning a business.

133 Cong. Rec. 37,824 (1987). Senator Kerry expressed his view that Section 8(a), as amended by S. 1993, would provide such support.[4]

Senator Weicker stated, regarding the Section 8(a) program, that "[d]iscrimination * * * and other social or economic disadvantages that minority citizens still face on the road to business opportunity are being challenged through this small but very vital program." 134 Cong. Rec. 17,136 (1988).

Similarly, Senator Sasser stated that "the 8(a) program provides important business opportunities

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[4] Senator Kerry had then recently introduced S. 1848, the Minority Business Development Act. 133 Cong. Rec. 30,771 (1987). Upon introduction of that bill, Senatory Kerry stated:

> Let us make no mistake; there is still a tremendous amount of work to be done before we can say that racism and other forms of discrimination have been abolished in the economic marketplace. Minority business ownership is still dramatically below that of nonminority business ownership in most areas of the country.

to members of our society who have long been denied such opportunity." 134 Cong. Rec. 17,149 (1988).

After presenting the Conference Report on the Section 8(a) program to the Senate, Senator Bumpers stated that the program "is intended to provide access to the Federal procurement system to those who have been denied access for a long time, and it is intended to build business skills and to develop capital through the performance of essential Government contracts." 134 Cong. Rec. 31,492 (1988).

Senator Levin stated that "[t]he 8(a) Program is intended to give disadvantaged individuals a chance to own their own businesses and to bring them needed jobs and training by giving them an opportunity to participate in the Federal acquisition process. * * * [T]he 8(a) Program provides important business opportunity to members of our society who have long been denied such opportunity." 134 Cong. Rec. 31,493 (1988).

6. Considering the extensive floor debates and numerous hearings regarding the necessity, success and viability of the DBE set-aside provision of STAA and the Section 8(a) program, "it is inconceivable that Members of both Houses were not fully aware of the objectives of the * * * provision[s] and of the reasons prompting [their] enactment." *Fullilove*, 448 U.S. at 467 (opinion of Burger, C.J.).

7. Since the passage of STURAA and the SBA, Congress as well as the Executive Branch have continued to monitor closely the success and progress of the Section 8(a) program and the Section 106(c) DBE provision of STURAA. See, *e.g.*, Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, 108 Stat. 3243; Intermodal Surface Transportation Efficiency Act of 1991, Pub. L. No. 102-240, § 1003(b), 105 Stat. 1919-1921; *Minority Franchising—Is Discrimination a Factor?: Hearing Before the House Comm. on Small Business*, 103d Cong., 1st Sess. (1993); *SBA's Minority Business Development Program: Hearing Before the House Comm. on Small Business*, 103d Cong., 1st Sess. (1993) (hearing to discuss reforms to SBA's Section 8(a) program); *Problems Facing Minority and Women-Owned Small Businesses in Procuring U.S. Government Contracts: Hearing Before the Subcomm. on Commerce, Consumer, and Monetary Affairs of the House Comm. on Government Operations*, 103d Cong., 1st Sess. (1993); *Discrimination in Surety Bonding: Hearing Before the Subcomm. on Minority Enterprise, Finance, and Urban Development of the House Comm. on Small Business*, 103d Cong., 1st Sess. (1993); *Small Business Development: Hearing Before the Subcomm. on Procurement, Tourism, and Rural Development of the House Comm. on Small Business*, 102d Cong., 2d Sess. (1992); *Problems with Equal Employment Opportunity and Minority and Women Contracting at the Federal Banking Agencies: Hearing Before the House Comm. on Banking, Finance and Urban Affairs*, 102d Cong., 2d Sess. (1992) (discussion of RTC's progress in satisfying goals for utilizing DBEs); *Small Disadvantaged Business Issues: Hearings Before the Investigations Subcomm. of the House Comm. on Armed Services*, 102d Cong., 1st Sess. 11 (1991) (remarks by Rep. Collins that the Department of Defense (DOD) "simply has not made adequate good faith outreach efforts"; DOD's subcontracting with DBEs "has resulted in a paltry performance of 2.5 to 3 percent each year, and many of those contracts were for janitorial and kitchen services"); *Minorities and Franchising: Hearing Before the House Comm. on Small Business*, 102d Cong., 1st Sess. 54 (1991) (statement by Chairman LaFalce

that problem areas that are more pronounced and specific to minority franchising include "problems relating to the exclusion of minorities, or groups of minorities, from franchise systems"); *Acquisition Issues: Hearings Before the Investigations Subcomm. of the House Comm. on Armed Services*, 101st Cong., 2d Sess. 12 (1990) (chart showing percentage of DOD subcontracts awarded to DBEs as 1.9% in 1988, and 2.3% in 1989); *Minority Construction Contracting: Hearing Before the Subcomm. on SBA, the General Economy, and Minority Enterprise Development of the House Comm. on Small Business*, 101st Cong., 1st Sess. (1989) (examination of minority and women's subcontracting opportunities in federal construction projects); *Implementation of Small Business Subcontracting Program: Hearing Before the House Comm. on Small Business*, 100th Cong., 2d Sess. (1988); *Subcontracting with Small and Disadvantaged Businesses—GSA Oversight: Hearing Before a Subcomm. of the House Comm. on Government Operations*, 100th Cong., 2d Sess. (1988); General Accounting Office, *Minority Contracting: DOD's Reporting Does Not Address Legislative Goal* (July 1993) (discusses failure of DOD to meet procurement obligations); General Accounting Office, *Problems Continue With SBA's Minority Business Development Program* (Sept. 1993); General Accounting Office, *Resolution Trust Corporation: Status of Minority and Women Outreach and Contracting Program* (May 1993) (concluding that RTC is short of goal for contracting with minority- and women-owned law firms); H.R. Rep. No. 1044, 100th Cong., 2d Sess. (1988) (documenting failure of GSA to meet its statutory mandate to provide subcontracting opportunities for small businesses and minority-owned businesses on major GSA contracts).

APPENDIX C

Census Data Available to Congress Regarding Minority-Owned Businesses in Construction and Related Census Data

Minorities are underrepresented in business generally, and in the construction industry particularly. In 1987, there were over 1.2 million minority-owned firms with gross receipts of just under $78 billion. Bureau of the Census, U.S. Dep't of Commerce, *1987 Economic Censuses—Survey of Minority-Owned Business Enterprises: Summary* 3 (Aug. 1991) [hereinafter *Summary*]. Minority-owned firms accounted for 8.9% of the total number of individual proprietorships, partnerships, and subchapter S corporations in the United States and 3.9% of their gross receipts. *Ibid.*

In 1987, the gross receipts for minority-owned construction firms constituted approximately 3% of the total receipts for all construction firms. Bureau of the Census, U.S. Dep't of Commerce, *1987 Economic Censuses—Characteristics of Business Owners* 8-9 (Table 1) (Apr. 1992) [hereinafter *Characteristics*].[1] The total number of minority-owned firms in the construction industry was approximately 6.6% of the total number of firms in that industry. *Ibid.* Minorities were even less well represented in the heavy construction industry, in which minority-owned firms were approximately 5.3% of the total number firms in that industry, and accounted for

---

[1] There are three main types of construction activities reported in census data: general building contractors, heavy construction contractors, and special trade contractors. The building of roads, bridges, sewers, tunnels, etc., is reported in the heavy construction category.

only 1.9% of the total receipts for all heavy construction firms. *Ibid.*

Moreover, minority-owned businesses occupy a proportionally smaller market share and are on the whole less prosperous than their nonminority counterparts. In 1987, the average gross sales and receipts in the construction industry was $146,103 for nonminority-owned firms. That figure was 2.7 times the average for American Indian-owned firms, 2.5 times the average for black-owned firms, 2.4 times the average for Hispanic-owned firms, and 1.6 times the average for Asian-owned firms. *Characteristics* 8 (Table 1); *Summary* 10 (Table 1). Hispanic construction-firm owners were 50% more likely to have household incomes of less than $10,000 compared to nonminority male construction-firm owners. *Characteristics* 74 (Table 12a). Further, only 27.6% of minority-owned construction firms had paid employees, compared to 34.7% of nonminority-owned construction firms. *Summary* 10 (Table 1), 84 (Table 10).

Minority-owned firms tend to employ minorities at a greater rate than nonminority male-owned firms. 57.3% of minority-owned construction firms with employees had minority employees on the payroll, compared to 34.3% of nonminority male-owned firms. *Characteristics* 178-179 (Table 24a).

In those industries that sell and produce supplies and equipment for construction, minority-owned firms were equally underrepresented as in the construction industry taken as a whole. Minority-owned firms in the wholesale trade industry accounted for only 6.1% of the total number of firms in that industry and only approximately 2.7% of the gross receipts. *Characteristics* 8-9 (Table 1). In the manufacturing industry, only 7% of the total number of firms were minority-owned, and those firms accounted for only 1.8% of the gross receipts. *Ibid.*

Most of this country's racial and ethnic minorities remain poorer and less educated and suffer greater unemployment than the white majority. For example, in 1992 the percentage of families with incomes below the poverty level was 3.5 times higher among black families than among white families. 1990 census data show that 8.8% of white families had incomes below the poverty level, compared to 30.4% of black families, 26.5% of families of Hispanic origin, 12.9% of Asian and Pacific Islander families, and 30.9% of American Indians, Eskimos and Aleuts. Bureau of the Census, U.S. Dep't of Commerce, *Statistical Abstract of the United States: 1993*, at 47 (Table 50), 471 (Table 741), 473 (Table 743) (1993) [hereinafter *1993 Statistical Abstract*].[2] Overall, the median income for minority families was approximately three-fifths of the median for white families. *Id.* at 462 (Table 721). If wealth instead of income is compared, the picture is even bleaker. When average net worth is considered, minorities owned fewer than $23 in assets for every $100 in assets owned by whites; when median net worth is considered, minorities owned fewer than $7 in assets for every $100 in assets owned by whites. *Id.* at 477 (Table 753).

Minorities also have received less education than white persons. Among persons 25 years old and

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[2] We note the similarity between those rates and the poverty rates for minority families we described 15 years ago in our brief to the Court in *Fullilove* v. *Klutznick*, 448 U.S. 448 (1980). U.S. Br. at 3a (No. 78-1007) (29.8% of black families, 20.4% of families of Spanish heritage, and 33.3% of American Indian families).

older, 79.1% of white persons had completed four years of high school or more by the time of the 1990 census. *1993 Statistical Abstract* 154 (Table 233). Only 66.2% of black persons, 50.8% of persons of Hispanic origin, and 65.6% of American Indians had completed high school. *Ibid.*; 1 Bureau of the Census, U.S. Dep't of Commerce, *1990 Census of Population: Characteristics of American Indians by Tribe and Language* 95 (Table 4) (July 1994) [hereinafter *Characteristics of American Indians*]. In the same age group, 22.0% of all white persons had completed four years of college or more, while only 11.3% of black persons, 9.2% of persons of Hispanic origin, and 9.4% of American Indians had finished college. *1993 Statistical Abstract* 154 (Table 233); *Characteristics of American Indians* 95 (Table 4).

Unemployment affects minorities at a greater rate than whites. While whites in 1990 had an unemployment rate of 4.7% and Asians a rate of 4.2%, blacks suffered at 11.3%, persons of Hispanic origin at 8.0%, and Native Americans at 14.4% *1993 Statistical Abstract* 47 (Table 50), 395 (Table 625); Bureau of the Census, U.S. Dep't of Commerce, *1990 Census of Population—Social and Economic Characteristics: United States* 111 (Table 108) (Nov. 1993).

Those statistics demonstrate a worsening of the economic position of minority families. By 1990, the median income for white families had increased in constant dollars by $3,890 since 1975, while the median income for black families had increased by only $1,049, and the median income for Hispanic families had increased by only $1,270. *1993 Statistical Abstract* 462 (Table 721). The greater increase

in white income reduced the ratio of minority-to-white median family income from approximately two-thirds in 1975 to three-fifths in 1990. *Ibid.*

Racial/ethnic composition as of April 1, 1990

	White	Black	Hispanic	Indian/ Eskimo/ Aleut	Asian/ Pacific Islander	Other
United States	80.3	12.1	9.0	0.8	2.9	3.9
Colorado	88.2	4.0	12.9	0.9	1.8	

1993 Statistical Abstract **18 (Table 18), 30-31 (Table 32).**

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In The

Supreme Court of the United States

October Term, 1994

ADARAND CONSTRUCTORS, INC.,

Petitioner,

v.

FEDERICO PENA, Secretary of Department of Transportation; THOMAS D. LARSEN, Administrator of the Federal Highway Administration; LOUIS N. MACDONALD, Administrator Region VIII of the Federal Highway Administration; and JERRY BUDWIG, Division Engineer of the Central Federal Lands Highway Division,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

PETITIONER'S REPLY BRIEF

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SUMMARY OF ARGUMENT

Adarand challenges the constitutionality of the Federal Construction Procurement Program,[1] both on its face and as applied. Adarand has standing because the race-based presumption contained in federal law caused Adarand to lose a subcontract upon which Adarand was the low bidder. Adarand's claim of injury and the remedy this Court is capable of granting are neither "remote" nor "highly contingent."

The Federal Construction Procurement Program is race-based, not disadvantage-based. Only those persons who are members of the statutorily-listed racial minorities are entitled to automatic certification as Disadvantaged Business Enterprises (DBEs). The social and economic status of those members of the statutorily-listed racial minorities are not factors in their certification as DBEs, unless that certification is challenged by third parties. Furthermore, Respondents failed to carry their burden of producing evidence that it was "disadvantage" and not the racial presumption that caused Gonzales Construction Company to be certified as a DBE.

Administrative convenience is not a compelling governmental interest for the use of a race-based presumption. The Subcontracting Compensation Clause (SCC) operates as an unconstitutional inducement in the award of the subcontract on the basis of race.

The Federal Construction Procurement Program is not narrowly tailored. The program is overinclusive because it applies to all members of the statutorily-listed minorities regardless of the social and economic status of those individuals. The program is also underinclusive.

Stare decisis requires the application of strict scrutiny to the Federal Construction Procurement Program.

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[1] "The Federal Construction Procurement Program" is Adarand's shorthand method of referring to the challenged program which is authorized by § 502 of the Small Business Act, 15 U.S.C. § 644(g) and funded by § 106(a)(8) of the Surface Transportation and Uniform Relocation Assistance Act of 1987 (STURAA), Pub. L. 100-17, 101 Stat. 132 (1987). (Petitioner's Brief at 5.)

ARGUMENT

I. ADARAND CHALLENGES THE CONSTITUTIONALITY OF THE FEDERAL CONSTRUCTION PROCUREMENT PROGRAM BOTH ON ITS FACE AND AS APPLIED.

Respondents' characterization of Adarand's challenge as a "facial challenge" is in error.[2] Adarand's challenge to the constitutionality of the program is both a facial and an "as applied" challenge.

A facial challenge is one where the challenge does not seek "specific relief for injury allegedly flowing from specific applications of the program." *Fullilove v. Klutznick*, 448 U.S. 448, 480 (1980). In the case at bar Adarand seeks "specific relief" for the loss of the contract that was awarded to Gonzales Construction Company (Gonzales), even though Adarand was the low bidder on that contract.[3]

II. ADARAND HAS STANDING TO CHALLENGE THE CONSTITUTIONALITY OF THE FEDERAL CONSTRUCTION PROCUREMENT PROGRAM.

Respondents argue that Adarand does not have standing to bring this action for two reasons. First, Respondents argue that "Petitioner has completely failed to show that the [race-based] presumption affected the award of the subcontract in

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[2] Respondent's Brief at 4, 22 and 25.

[3] "[The Federal Construction Procurement Program] affect[s] [Adarand]'s ability to bid on projects which are funded in whole or in part by federal monies. [The Federal Construction Procurement Program] encourage[s] and effectively compel[s] prime contractors to use DBEs or MBEs for the specialty subcontract work that [Adarand] performs. Because of the programs which have been implemented under [the Federal Construction Procurement Program], DBEs or MBEs are awarded contracts that Plaintiff would have received in the past because it submitted the lowest bid for the work." (R. Colo. # 24, Exhibit F, Pls. Answers to Defs. Interro. Number 15.)

this case to another bidder. . . . " (Respondents' Brief at 27.) Second, Respondents argue that "petitioner has also failed to allege or prove that the future relief it seeks would affect its business opportunities." (Respondents' Brief at 27-28.) In other words, "[t]he asserted future harm upon which petitioner's claim is based is, however, both remote and highly contingent." (Respondents' Brief at 29.)

Respondents admit that the Federal Construction Procurement Program, including the SCC, has a race-based presumption. That race-based presumption plays a role in the award of contracts under the Federal Construction Procurement Program. Regarding the question of standing, it doesn't matter if the role of the race-based presumption is described as "procedural rather than a substantive." (Respondents' Brief at 25.) Nor is that description of the race-based presumption relevant to the standard of review that must be applied.

Respondents do not dispute that, as a result of the operation of the SCC, Adarand was denied a contract on which it was the low bidder. Nor do Respondents dispute that Adarand's cause of action is based on the Equal Protection Component of the Due Process Clause of the Fifth Amendment. Rather Respondents argue that Adarand does not have standing to challenge the racial presumption since, among Respondents' other allegations, Adarand failed to show that the DBE status of Gonzales was as a result of race and not disadvantage. (Respondents' Brief at 27-29.) Respondents seek thereby to address an issue that must be considered on the "merits" – that is, what is the appropriate standard of review – as a question of "standing" in order to deny this Court jurisdiction to decide the merits. This attempt fails.

There is a difference between the "merits" – that is, the "test" to be applied – and "standing:"

> [The] test goes to the merits. The question of standing is different. It concerns, apart from the "case" or "controversy" test, the question whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected . . . by the . . . constitutional guarantee in question.

Data Processing Service v. Camp, 397 U.S. 150, 153 (1970). There is no question that the "interest sought to be protected by" Adarand is guaranteed by the Due Process Clause of the Fifth Amendment. Therefore, Adarand has standing pursuant to the Fifth Amendment to have this Court decide, *inter alia*, the appropriate standard of review to be applied to the Federal Construction Procurement Program.

A. ADARAND'S CLAIM OF INJURY BY THE OPERATION OF THE FEDERAL CONSTRUCTION PROCUREMENT PROGRAM IS NEITHER "REMOTE" NOR "HIGHLY CONTINGENT."

Adarand's claim of injury arising from the equal protection violation is neither "remote" nor "highly contingent." Randy Pech, General Manager of Adarand, testified that Adarand bids on every job that involves guardrail work in Colorado and is qualified to do guardrail work in Kansas.[4] (Appendix A, 5-A.) (The Pech Deposition was made a part of the record by Respondents in their Brief in Support of Motion for Summary Judgment R. Colo. # 19 at 4.) *See* also footnote 3. A decision that the Federal Construction Procurement Program is unconstitutional will allow Adarand to compete on an equal footing for each contract that CFLHD offers in Colorado. The number of contracts for which Adarand will thus be able to compete is not insubstantial since the CFLHD let 78 contracts that involved guardrail work between 1983 and 1990. The availability of even one contract a year in which Adarand can complete on equal footing is not "remote" or "contingent." Adarand has standing to challenge the Federal Construction Procurement Program.

Furthermore, in *Fla. Gen. Contractors v. Jacksonville*, this Court resolved any question regarding Adarand's standing to bring this challenge:

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[4] Guardrail work is one of the smaller items in a highway construction contract that is frequently subcontracted. (Appendix A, 9-A.)

> When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing. The "injury in fact" in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit . . . . And in the context of a challenge to a set-aside program, the "injury in fact" is the inability to compete on an equal footing in the bidding process, not the loss of a contract. . . . *To establish standing, therefore, a party challenging a set-aside program . . . need only demonstrate that it is able and ready to bid on contracts and that a discriminatory policy prevents it from doing so on an equal basis.*

Fla. Gen. Contractors v. Jacksonville, 508 U.S. ___, 124 L.Ed.2d 586, 597-598 (1993). (Emphasis added.)

Adarand has demonstrated, by uncontroverted evidence, that "it is able and ready to bid on contracts and that [the] discriminatory policy [of the Federal Construction Procurement Program] prevents it from doing so on an equal basis." *Id.* Furthermore, Adarand has demonstrated that it lost a contract as a result of the operation of that federal race-based program. Adarand has standing. (J.A. 30-31.)

B. THE PRESUMPTION THAT RESPONDENTS ADMIT IS RACE-BASED WAS THE SOLE REASON FOR THE AWARD OF THE SUBCONTRACT TO GONZALES.

The evidence before this Court is that the subcontract for which Adarand submitted the lowest bid was awarded to Gonzales exclusively on the basis of race. Gonzales qualifies as a DBE because of the minority status of its owner and operator. Gonzales is owned and operated by a male who is a member of a racial minority accorded a preference under the Federal Construction Procurement Program. (Appendix A, 3-A, Colo # 24, Exhibit F, Pls. Answers to Defs. Interro.

Number 9, Attach. 1, first page.) The use of race by the federal government is the issue in this case since the use of race by the federal government was the reason for the harm suffered by Adarand. Adarand's injury will be remedied by a favorable decision in this case. Thus, Adarand has standing.

III. THE FEDERAL CONSTRUCTION PROCUREMENT PROGRAM IS BASED ON RACE AND NOT DISADVANTAGE.

A. SINCE RACE IS THE ONLY FACTOR THAT RESULTS IN "CERTIFICATION," INDIVIDUALS WHO ARE MEMBERS OF A LISTED RACIAL GROUP ARE TREATED DIFFERENTLY THAN INDIVIDUALS WHO ARE NOT MEMBERS OF THE LISTED RACIAL GROUPS.

Respondents disingenuously describe the Federal Construction Procurement Program by asserting erroneously that "[t]he Subcontracting Compensation Clause program is thus a program based on *disadvantage*, not on race." (Respondents' Brief at 26.) (Emphasis in original.)[5]

[5] Respondents do not cite any authority – neither statute nor regulation – for the proposition that a minority must prove discrimination to participate in the program. Furthermore, Respondents fail to identify any evidence in the record that a minority must prove discrimination before that individual is certified as a DBE. In fact, just the opposite is true.

The regulations that control a state's ability to certify DBEs are found at 49 C.F.R. Part 23. As explained in Petitioner's Brief on the merits, the regulations at 49 C.F.R. Part 23 are applicable to the CFLHD since they control how DBEs are certified by states. The CFLHD does not certify DBEs, rather it accepts the decision of state agencies as to what entities are DBEs.

Respondents are simply wrong.[6] The decision that an individual qualifies as a DBE is based solely upon the race of

Review of the regulations illustrates that the program under which the SCC is used is based solely on race and not upon "disadvantage," contrary to the assertions of Respondents. The regulations under which states certify DBEs are found in 49 C.F.R. Part 23, Subpart D, Appendix A. The section of Appendix A that explains 49 C.F.R. § 23.62 *Definitions* specifically provides: "In order to be an *eligible disadvantaged business*, a firm *must meet the criteria of § 23.53 of this regulation* and must be certified as 49 CFR part 23 provides." 49 C.F.R. Pt. 23, Subpt. D, App. A (analysis of Section 23.62). (Emphasis added.)

Section 23.53 is entitled "Eligibility standards" and provides:

> The following standards shall be used by recipients in determining whether a firm is owned and controlled by one or more *minorities* or women (sic) is and shall therefore eligible to be certified as an MBE.

49 C.F.R. § 23.53. (Emphasis added.)

[6] "The proposal in the NPRM to make the presumption of social and economic disadvantage rebuttable caused some confusion among recipients who commented. They asked whether this meant that they had to investigate the social and economic status of each business owner that sought certification for programs covered by Subpart D. . . .

This section is intended to answer these questions. First, the basic meaning of a presumption of social and economic disadvantage is the recipient *assumes* that a member of the designated groups is socially and economically disadvantaged. In making certification decisions, the recipient relies on this presumption, and does not investigate the social or economic status of individuals who fall into one of the presumptive groups.

However, saying that the presumption is rebuttable means that a third party may challenge the actual social and/or economic disadvantage of a business owner who has received or is seeking certification for his firm from recipient. . . . [W]hile a challenge is in progress, the presumption of social and economic disadvantage remains in effect." 49 C.F.R. Pt. 23, Subpt. D, App. A, at page 216 (10-1-92 Edition). (Emphasis in original.)

The SBA regulations are similar. "(1) In the absence of evidence to the contrary, the following individuals are presumed to be socially disadvantaged: Black Americans; Hispanic Americans. . . .

(2) An individual seeking socially disadvantaged status as a member of a designated group may be required to demonstrate that he/she holds himself/herself out and is identified as a member of a designated group if

the individual.[7] The only individuals whose applications for certification as DBEs are reviewed on what Respondents call a "case-by-case basis" are non-minorities, including "disabled Vietnam veterans, Appalachian white males, [or] Hasidic Jews."[8] Members of the statutorily-listed racial groups[9] are "presumed" to be "socially and economically disadvantaged and are automatically certified, unless a third party challenges that certification.[10]

Contrary to the assertion of Respondents, minority applicants for DBE certification are not reviewed on a case-by-case basis. However, non-minority applicants, if any, are.

SBA has reason to question such individual's status." 13 C.F.R. § 124.105(b). Therefore, the only case-by-case investigation the SBA undertakes – and then only if its has "reason to question" an entity's status – is to establish the minority status of the owner and operator, not whether the entity's owner and operator is disadvantaged.

[7] "In making certification decisions, the recipient relies on this presumption, and does not investigate the social or economic status of individuals who fall into one of the presumptive groups." (49 C.F.R. Pt. 23, Subpt. D, App. A, at page 216 (10-1-92 Edition).)

[8] *See* Respondents' Brief at 16-17 where Respondents argue that these individuals can be certified as disadvantaged. Yet, members of the statutorily-listed racial minority groups need only provide evidence of their race, no other evidence is required. (15 U.S.C. § 637(d)(3)(C).) Under federal statute and regulation, membership in one of the statutorily-listed racial groups qualifies that individual "presumptively" as a DBE. (49 C.F.R. Pt. 23, Subpt. D, App. A, at page 216 (10-1-92 Edition).

[9] "The contractor shall presume that socially and economically disadvantaged individuals include Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities, or any other individual found to be disadvantaged by the Administration pursuant to section 8(a) of the Small Business Act." 15 U.S.C. § 637(d)(3)(C).

[10] Respondents state: "Small business owners who establish their social disadvantage must also demonstrate to the Administration that they are economically disadvantaged. . . . " (Respondents' Brief at 14.) This description is simply wrong. If an applicant is a member of the listed racial groups, the certifying agency does not investigate either the social or economic status of the applicant. *See* note 7.

Clearly, the Federal Construction Procurement Program is race-based and not disadvantage-based.

B. FEDERAL STATUTE ESTABLISHES A PRESUMPTION THAT LISTED MINORITIES ARE TO BE CERTIFIED AS DBES.

Respondents argue that Adarand failed to prove that Gonzales was certified as a DBE as a result of the presumption contained in the federal statute. (Respondents' Brief at 28.) Yet, the federal statute and the implementing regulations themselves prove that the presumption was the sole basis upon which certification was granted to Gonzales.

In defining "socially and economically disadvantaged" individuals, the regulations specifically state:

> Recipients [like the state of Colorado which would certify DBEs in Colorado] *shall* make a rebuttable presumption that individuals in the following groups are socially and economically disadvantaged. Recipients also *may* determine, on a case-by-case basis, that individuals who are not members of one of the following groups are socially and economically disadvantaged. (a) Black Americans . . . Hispanic Americans . . . Native Americans . . . Asian-Pacific Americans . . . and Asian-Indian Americans. . . .

49 C.F.R. § 23.62. (Emphasis added.)

Colorado is a "recipient," as defined by the regulations and is required to presume that certain racial groups are "disadvantaged" and entitled to DBE status. Thus, the decision to certify Gonzales as a DBE was based upon the race of the owner and operator of Gonzales and upon no other basis. Since the decision to certify Gonzales as a DBE was based on race and Adarand has claimed a violation of its constitutionally protected right of equal protection, this case is properly before the Court.

C. RACE WAS THE SOLE FACTOR USED TO AWARD THE SUBCONTRACT TO GONZALES RATHER THAN TO ADARAND.

Respondents argue that Adarand has failed to prove that the decision to certify Gonzales as a DBE was made on the basis of race. (Respondents' Brief at 28.) In essence, Respondents would require Adarand to prove that government officials charged with duties under the Federal Contract Procurement Program obeyed the law. There is no such requirement. Government officials must obey the law which includes regulations issued pursuant to the law. *Service v. Dulles*, 354 U.S. 363, 388 (1957). It is the duty of federal officials to comply with the statutory presumption and to award members of the enumerated racial groups DBE status. Officials are presumed to have obeyed that law.[11]

1. RESPONDENTS HAVE THE BURDEN OF PROVING THAT THE RACE OF THE OWNER AND OPERATOR OF GONZALES WAS NOT THE BASIS FOR ITS CERTIFICATION AS A DBE.

Respondents argue that Adarand failed to prove that Gonzales' certification as a DBE was based on the race of its owner and operator. (Respondents' Brief at 28.) Adarand has no such burden. *St. Mary's Honor Center v. Hicks*, 509 U.S. ___, 125 L.Ed.2d 407, 416 (1993). The federal law and its implementing regulations require that all members of listed racial groups be "presumed" "socially and economically disadvantaged" and certified as DBEs. Gonzales was certified as a DBE due to the operation of federal law and regulation. That fact is both undisputed and undisputable. Adarand is not required to prove that if the federal government had inquired into the social and economic status of Gonzales, it would have

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[11] "Perhaps because the point is so obvious, we have never been confronted with a controversy that required us to rule upon it . . . . " *Nollan v. California Coastal Commission*, 483 U.S. 825, 831 (1987).

discovered that Gonzales was not "socially and economically disadvantaged." That places a hypothetical upon a hypothetical.[12]

Moreover, Respondents ignore the legal significance of a presumption imposed by this Court in the context of a claim of racial discrimination.

> [T]he McDonnell Douglas presumption places upon the defendant the burden of . . . 'producing evidence' that the adverse employment actions were taken 'for a legitimate, nondiscriminatory reason.' (Citing authority.) '[T]he defendant must clearly set forth, through the introduction of admissible evidence,' reasons for its actions which, *if believed by the trier of fact*, would support a finding that unlawful discrimination was not the cause of the employment action.

St. Mary's Honor Center v. Hicks, 125 L.Ed.2d at 416. (Emphasis in original.) In other words, the presumption that it was the race of Gonzales that was the reason for its certification as a DBE continues until Respondents produce "admissible evidence" that meets or rebuts that presumption.

It is the statutory presumption of disadvantage based on race contained in federal statute that allows Gonzales to participate in the Federal Construction Procurement Program as a DBE. Adarand not only alleged in its complaint that Gonzales is a DBE (R. Colo. # 1, at 9), but presented evidence that Gonzales is a "qualified DBE." (J.A. at 30.) Adarand presented evidence that it was the minority status of Gonzales' owner and operator and the resultant award of DBE certification that caused Adarand to lose the West Dolores subcontract. (Appendix A, 3-A, R. Colo # 24, Exhibit F, Pls. Answers to Defs. Interro. Number 9, Attach. 1, first page.)

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[12] This assertion by Respondents illustrates another burdensome aspect of the Federal Contracts Procurement Program, that is, the fact that the burden is on third parties, not the federal government, to determine that entities are qualified for the special treatment accorded under the program. *See* Petitioner's Brief at 24, n.21.

Once Adarand proves that race is a possible basis for the decision to certify Gonzales as a DBE, the burden of producing evidence shifts to Respondents.[13] Respondents then have the burden of producing evidence showing that the decision to grant Gonzales DBE status was not based upon race, but was based upon actual social and economic disadvantage suffered by its owner and operator. *St. Mary's Honor Center v. Hicks*, 125 L.Ed.2d at 416.

Yet, Respondents produced no evidence that Gonzales' certification as a qualified DBE was "for a legitimate, non-discriminatory reason." *Id.* Since the presumption was not rebutted by Respondents, it continues in force. Respondents have failed to carry their burden of producing evidence that the race-based presumption was not the basis for Gonzales' certification as a DBE. (FRE 301)

2. ADARAND PRESENTED UNREFUTED EVIDENCE THAT THE RACE OF THE OWNER AND OPERATOR OF GONZALES CAUSED ADARAND'S INJURY.

Adarand presented unrefuted evidence that Gonzales was certified as a DBE because of the operation of the presumption contained in federal law and regulations. Randy Pech, General Manager of Adarand Constructors, Inc, in his answers to interrogatories, signed under oath, testified that

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[13] *Arlington Heights v. Metro Housing Corp.*, 429 U.S. 252, 270, n.21 (1977) ("Proof that the decision by the Village was motivated *in part by racially discriminatory purpose* would. . . . *have shifted to the Village the burden of establishing that the same decision would have resulted even had the impermissible purpose not been considered.* If this were established, the complaining party in a case of this kind no longer fairly could attribute the injury complained of to improper consideration of a discriminatory purpose.") (Emphasis added.)

Clearly race is not just one of the bases for certification of Gonzales as a DBE, it is the only basis. Federal statute and regulations require that if an entity's owner and operator is a member of one of the listed racial groups, it is to be certified as a DBE. The certifying entity is to look no further. (49 C.F.R. Pt. 23, Subpt. D, App. A, at page 216 (10-1-92 Edition).)

"Gonzales Construction was awarded this job because of *his minority status*." (Appendix A, 3-A, R. Colo # 24, Exhibit F, Pls. Answers to Defs. Interro. Number 9, Attach. 1, first page.) (Emphasis added.)[14] "[T]his job" refers to the West Dolores Project that is the subject of this action. This is conclusive and unrebutted evidence that Gonzales is a DBE because of "his minority status." It is also conclusive and unrebutted evidence that Gonzales is owned and/or operated by a male.

Furthermore, three federal officials testified that they knew of no DBEs in Colorado that were certified on any basis other than the statutory presumption.[15] Since Gonzales is a

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[14] Furthermore, Mr. Pech stated that "[c]ontracts are awarded based on race because of the definitions given for Disadvantaged Business Enterprises that *includes only those groups that have certain racial backgrounds*. The Subcontracting procedures favor those business enterprises that qualify under the program – only those businesses that are owned and operated by a minority are so qualified." (R. Colo # 24, Exhibit F, Pls. Answers to Defs. Interro. Number 23.) (Emphasis added.) Respondents offered no evidence in rebuttal. This evidence remains uncontroverted.

[15] Jerry Budwig, Division Engineer of the CFLHD and one of the Defendants in this case, testified:

Q: Do you know of anyone other than women that's a DBE in the state of Colorado that does not fit the description of presumed disadvantaged?

A: No.

(Appendix A, 7-A.) (A portion of Mr. Budwig's Deposition is located at App. 45-48.)

Craig Actis, Contract Development Engineer for the CFLHD, testified:

Q: Do you know of any DBEs in the state of Colorado currently that are not presumptively disadvantaged other than women?

A: DBEs as certified by who?

Q: By the state – well, certified by Central Federal [Lands Highway Division]?

A: We don't certify DBEs.

Q: Okay. Who certifies them?

A: We accept certification from the state or the Small Business Administration, generally.

Colorado business, operating out of Dolores, Colorado,[16] and is certified by Colorado as a DBE, it is clear from all of the evidence below, including the testimony of federal officials, that the certification of Gonzales was based upon the racial presumption, a presumption that Respondents failed to even attempt to rebut.

IV. ADMINISTRATIVE CONVENIENCE IS NOT A COMPELLING GOVERNMENTAL INTEREST THAT JUSTIFIES THE USE OF RACE AS A BASIS FOR THE AWARD OF CONTRACTS UNDER THE FEDERAL CONSTRUCTION PROCUREMENT PROGRAM.

Respondents assert that the use of race in the Federal Construction Procurement Program "plays a procedural rather than a substantive role in the contracting program." (Respondents' Brief at 25.) Therefore, argue Respondents, the presumption facilitates administrative convenience. Even if this were true and it is not, and even if it were a distinction with a real difference, and it is not, this Court has held that "administrative convenience" cannot be a compelling governmental interest to justify the use of race as a basis for decision

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Q: With either one of those groups, do you know of any DBEs that don't meet that presumptively disadvantaged requirement?

A: No, I don't.

(Appendix A, 13A-14A) (The Actis Deposition was made a part of the record by Respondents in their Brief in Support of Motion for Summary Judgment.) (R. Colo. # 19 at 8.)

James L. Robinson, Contract Administration Engineer for the CFLHD, testified:

Q: Do you know of any certified DBEs that are not presumptively disadvantaged?

A: I'm not aware of any.

(Appendix A, 8-A and 11-A.) (A portion of Mr. Robinson's Deposition is located at App. 49-50.)

[16] (Appendix A, 2-A and 3-A, R. Colo. # 24, Exhibit F, Pls. Answers to Defs. Interro. Number 9, Attach. 1, first page.)

making. *City of Richmond v. Croson*, 488 U.S. 469, 508 (1989).

Moreover, Respondents seek to convince this Court that the racial presumption does not exist:

> A member of a racial minority group who has not himself or herself been the victim of racial prejudice is thus not to be treated as disadvantaged under the challenged program.

(Respondents' Brief at 25.) Respondents are wrong. There are no criteria under federal law and regulation that require a showing by an individual, who is a member of one of the statutorily-listed racial groups, that he has suffered personally from racial discrimination before he can be certified as a DBE. In fact, just the opposite is true. All that is required is that an applicant for DBE status be a member of one of the statutorily-listed racial groups. (49 C.F.R. Pt. 23, Subpt. D, App. A, at page 216 (10-1-92 Edition).)

There would be no reason to use a racial presumption if the Federal Construction Procurement Program was based on disadvantage rather than race.[17] The fact that the presumption exists proves that Respondents are in error when they describe the manner in which the Federal Construction Procurement Program operates. The Federal Construction Procurement Program is clearly based on race and not on disadvantage.

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[17] Respondents argue that only an individual who is an actual "victim of racial prejudice" is entitled to participate in the program. (Respondents' Brief at 25.) Paraphrasing Justice Scalia, "[n]othing prevents [the federal government] from according a contracting preference to identified victims of discrimination. . . . [however, under such a program] neither the beneficiaries nor those disadvantaged by the preference would be identified *on the basis of their race*. In other words, far from justifying racial classification, identification of actual victims of discrimination makes it less supportable than ever, because more obviously unneeded." *Croson*, 488 U.S. at 526-527 (Scalia concurring.) (Emphasis in original.) In other words, if Respondents' description of the program is correct, and it is not, there is no need nor justification for a racial presumption or preference.

V. THE SCC OPERATED AS AN UNCONSTITUTIONAL INDUCEMENT FOR THE PRIME CONTRACTOR TO SUBCONTRACT WITH A DBE RATHER THAN TO ACCEPT A LOWER BID FROM ADARAND.

Respondents argue that the SCC is "designed to offset the financial disincentives that would otherwise exist in employing and assisting disadvantaged businesses as subcontractors by covering the additional expenses associated with such employment." (Respondents' Brief at 17.) Although that may be the language that is used in the SCC, the unrefuted evidence in this case is to the contrary. The facts of this case show that the SCC operated as an unconstitutional inducement that caused the prime contractor to subcontract with a DBE rather than accept a lower bid from Adarand.[18] For example, all prime "contractors agreed that the SCC has caused them to accept DBE quotes when receiving lower quotes from non-DBEs, or when they could do the work for less by using their own forces." (R. Colo. # 24, Exhibit B, page 10).

Respondents assert that another reason to award the funds provided by the SCC is for the additional expenses the prime contractors incur in reporting on the additional work required of the prime contractors to obtain, train or otherwise

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[18] "[T]he primary reason that MOUNTAIN GRAVEL & CONSTRUCTION COMPANY gave the subcontract for the guardrail to Gonzales Construction, a qualified DBE, is because Gonzales Construction is a DBE and MOUNTAIN GRAVEL & CONSTRUCTION COMPANY felt economically compelled to award its subcontract to a DBE because MOUNTAIN GRAVEL & CONSTRUCTION COMPANY was entitled to a bonus of approximately $10,000.00 for awarding the subcontract to Gonzales Construction, a qualified DBE.

[B]ut for the requirements of the Federal Highway contracts which encourage prime constractors (sic) to use DBEs, MOUNTAIN GRAVEL & CONSTRUCTION COMPANY would have accepted the low bid submitted by ADARAND CONSTRUCTORS, INC., and awarded the subcontract to ADARAND CONSTRUCTORS, INC." (J.A. 30-31.)

assist the DBE that obtained the subcontract. (J.A. 25.) Yet, the CFLHD has never required those reports from the prime contractors and, therefore, has no information that the funds are necessary to cover additional reporting expenses, if any.[19]

Respondents argue that the funds awarded by the SCC cover the additional expenses incurred by the prime contractor in "locating" DBEs. (Respondents' Brief at 17.) Yet, the evidence is that "[a]ll of the [prime] contractors interviewed were not experiencing difficulty locating DBEs as subcontractors" (R. Colo. # 24, Exhibit B, page 10) and "[m]ost of the DBEs *find* the prime contractors and don't wait for them to come to them" (R. Colo. # 24, Exhibit B, page 11). (Emphasis added). There is no additional expense for the prime contractor to locate DBEs if the DBEs are coming to the prime contractors.

Other purported purposes for the funds provided under the SCC are to "train[ ]," "assist," and "supply[ ] all facilities and services" for the DBEs. (Respondents' Brief at 17.) Yet, the evidence is that "[a]ll of the DBE subcontractors interviewed . . . . are proficient in their specialty and didn't require assistance." (R. Colo. # 24, Exhibit B, page 11).

The CFLHD, which adopted the SCC provision, may not assume that certain races require financial or other assistance. *See* for example *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, at 277 (1986) ("Evidentiary support for the conclusion that remedial action is warranted [is] crucial.") There must be evidence that the disparity in treatment based on race is required. Respondents have provided no evidence that it costs more for a prime contractor to deal with a minority-owned business than it does to deal with a business owned by a white male. The only evidence, as indicated above, is that it does not cost more to deal with DBEs.

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[19] The CFLHD has never requested nor reviewed the reports required of the prime contractors so as to document any efforts in which they engaged to locate, train, utilize, assist, and develop DBEs under the SCC. (R. Colo. # 21, Statement of Facts, number 33, Appendix A, 9A-10A.)

Furthermore, the CFLHD's assumption, in the adoption of the SCC, that all DBEs require assistance is an impermissible stereotype. "Imposing a common burden [or benefit] on such a disparate class merely because each member of the class is of the same race stems from reliance *on a stereotype rather than fact or reason*." *Croson* 488 U.S. at 516 (Stevens concurring.) (Emphasis added.) Or as stated by Justice O'Connor: "a searching judicial inquiry" is necessary to ensure that the program is not "motivated by illegitimate notions of racial inferiority." *Id.* at 493. Not only does the SCC fail strict scrutiny, but it fails intermediate scrutiny since it implies "judgment concerning the abilities of owners of different races." *Metro Broadcasting v. FCC*, 497 U.S. 547, 602 (1990). Respondents' rational for the unconstitutional inducement provided by the SCC cannot withstand constitutional challenge.

VI. THE FEDERAL CONSTRUCTION PROCUREMENT PROGRAM IS NOT NARROWLY TAILORED.

Respondents' argument that the program at issue "is narrowly tailored" is unsupported by the law upon which the program is based and the facts of this case. (Respondents' Brief at 43-49.) Respondents' entire argument is based on their assertion that the program is not overinclusive because not all minorities are certified as DBEs and the program is not underinclusive because white males are treated the same as minorities under the program. Neither of these assertions is true.

The program is overinclusive because an entity owned and operated by a statutorily-listed minority need only show that its owner and operator is a member of one of the statutorily-listed minority groups to be certified as a DBE. The social and economic status of the owner and operator is an issue only if a third party challenges the entity's DBE certification. (49 C.F.R. Pt. 23, Subpt. D, App. A, at page 216 (10-1-92 Edition) for state certified businesses and 13 C.F.R. § 124.105(b)(2) for those certified by the SBA.)

Furthermore, the program is underinclusive because an entity owned and operated by a white male must not only prove that he is economically and socially "disadvantaged," he must also prove that he is identified with a group that has suffered discrimination.[20] Thus, the program is not narrowly tailored and clearly fails to survive constitutional scrutiny.

VII. THE PRINCIPLE OF *STARE DECISIS* REQUIRES THE APPLICATION OF STRICT SCRUTINY IN THIS CASE.

Respondents argue that "[t]his Court should not depart from the fundamental constitutional principle of *Fullilove* that Congress has unique powers to enact race-based remedies." (Respondents' Brief at 49.) Yet, adherence to *stare decisis* requires the application of precedents that utilize "strict scrutiny" when race is a part of government decision making.[21] *See, United States v. Paradise*, 480 U.S. 149, 166 n.16 (1987); *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954); *Korematsu v. United States*, 323 U.S. 214, 216 (1944); *Loving v. Virginia*, 388 U.S. 1, 11 (1967); and *Fullilove v. Klutznick*, 448 U.S. 448, 496 (1980) (J. Powell, concurring).

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[20] "Socially disadvantaged individuals are those who have been subjected to *racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities*." 15 U.S.C. § 637(a)(5). (Emphasis added.)

[21] "When a fragmented court decides a case and no single rationale explaining the result enjoys assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds.' " *Marks v. United States*, 430 U.S. 188, 193 (1977). Furthermore, "*reexamination of constitutional decisions is appropriate* when those decisions has generated uncertainty and failed to provide clear guidance, because 'correction through legislative action is practically impossible.' " *Planned Parenthood v. Casey*, 505 U.S. ___, 120 L.Ed.2d 674, 763 (1992) (CJ Rehnquist concurring in the judgment in part and dissenting in part.) (Emphasis added.) The *Fullilove* decision suffers from both of these deficiencies.

Respondents' reliance on *Fullilove* ignores this Court's caveat that the program upheld there – in a facial challenge – was a "short term measure." *Fullilove*, 448 U.S. at 457. Respondents also ignore the fact that the Federal Construction Procurement Program is at least 15 years old with no end in sight.[22] As a result, the Federal Construction Procurement Program violates this Court's holding that a race-based program may not be "ageless in [its] reach into the past, and timeless in [its] ability to affect the future." *Wygant*, 476 U.S. at 275. Respondents use of *stare decisis* and application of *Fullilove* is unavailing.

CONCLUSION

The District Court erred in granting Respondents' Motion for Summary Judgment and denying Adarand's Motion for Summary Judgment. The United States Court of Appeals for the Tenth Circuit erred in affirming the decision of the District Court. As has been shown by Petitioner's Brief and this Reply, Adarand is entitled to reversal of those decisions and entry of judgment in its favor.

Respectfully Submitted,

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[22] Mr. Budwig: "I'm not aware that [the government's DBE program's] end is in sight." (App. 47.)

APPENDIX A

DEPOSITION and ANSWERS TO INTERROGATORIES EXCERPTS

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

Civil Action No. 90-C-1413

ADARAND CONSTRUCTORS, INC.
a Colorado Corporation,

Plaintiff,

v.

SAMUEL K. SKINNER, Secretary of the Department of Transportation, ROBERT E. FARRIS, Administrator of the Federal Highway Administration, LOUIS N. MACDONALD, Administrator of Region VIII of the Federal Highway Administration, and JERRY BUDWIG, Division Engineer of the Central Federal Lands Highway Division,

Defendants.

PLAINTIFF'S ANSWERS TO DEFENDANTS' INTERROGATORIES

COMES NOW Plaintiff Adarand Constructors Inc. and for its answers to the Interrogatories submitted by the Defendants, responds as follows:

* * *

ATTACHMENT 1
QUESTION 9

PROJECT FH 59-3(3), BID ON 7/26/90. WE BID THIS AND ALL FOLLOWING JOBS FOR QUESTION 9 AS A SUB CONTRACTOR.

TYPE OF WORK	QUAN	ADARAND	GONZALES
556(2) STEEL BRIDGE RAILING,	65 LF	@ 54.00/LF	53.00
606(1) GUARD RAIL SYSTEM G-4,	5300 LF	@ 10.65/LF	9.95
606(2A) END ANCHOR TY A,	13 EA	@ 215.00/EA	220.00
606(2B) END ANCHOR TY B,	13 EA	@ 495.00/EA	485.00
606(2D) END ANCHOR TY D,	4 EA	@ 175.00/EA	220.00
MOBILIZATION,	1 EA	@ 2,100/EA	1,500.00
TOTAL		69,835	65,525.00

GONZALES CONSTRUCTION WAS AWARDED THIS JOB. GONZALES CONSTRUCTION IS A DBE COMPANY LOCATED AT P.O. BOX 1019, DOLORES, CO 81323.

THE PRIME CONTRACTOR ON THIS JOB IS GEARS, INC. GEARS IS A NON DBE COMPANY LOCATED AT 357 RIVERLAND DRIVE, CRESTED BUTTE, CO 81224.

I DO NOT KNOW IF THE COMPENSATION CLAUSE WAS APPLICABLE.

==========

PROJECT FH 60-2(2), BID ON 9/12/89.

TYPE OF WORK

606 GUARD RAIL TYPE 3,	10,000 LF	@ 9.25/LF
606 END ANCHORS TY 3E,	20 EA	@ 510/EA
MOBILIZATION	1 EA	@ 2,100.00/EA
TOTAL		104,800.00

GONZALES CONSTRUCTION WAS AWARDED THIS JOB BECAUSE OF HIS MINORITY STATUS. ADDRESS IS SAME AS ABOVE.

PRIME CONTRACTOR ON THIS JOB IS MOUNTAIN GRAVEL AND CONSTRUCTION WHICH IS A NON-DBE COMPANY AND IS LOCATED AT 601 CENTRAL AVE., DOLORES, CO 81323.

THE COMPENSATION CLAUSE WAS APPLICABLE ON THIS JOB.

==========

PROJECT FHWA PROJECT WYFH 11-1(3), BID ON 9/1/89. I BELIEVE THIS PROJECT WAS NEGOTIATED WITH TRIPLE M CONSTRUCTION UNDER THE A8 [sic] FEDERAL MINORITY DEVELOPMENT PROGRAM.

TYPE OF WORK	QUAN	ADARAND
606 GUARD RAIL TYPE 3,	1,050 LF	@ 10.00/LF
606 END ANCHORS TY 3E,	2 EA	@ 500/EA
MOBILIZATION	1 EA	@ 2,300.00/EA
	TOTAL	13,800.00

ADARAND CONSTRUCTORS WAS AWARDED THIS JOB.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Case No. 90-C-1413

DEPOSITION OF RANDY M. PECH
January 11, 1991

ADARAND CONSTRUCTORS, INC., a Colorado corporation,

Plaintiff

vs.

SAMUEL K. SKINNER, Secretary of the Department of Transportation, ROBERT E. FARRIS, Administor of the Federal Highway Administration, LOUIS N. MACDONALD, Administrator of Region VIII of the Federal Highway Administration and JERRY BUDWIG, Division Engineer of the Central Federal Lands Highway Division,

Defendants.

Pursuant to Notice and the Federal Rules of Civil Procedure, the deposition of RANDY M. PECH, called by the Defendants, was taken on January 11, 1991, commencing at 9:30 a.m., at 1961 Stout Street, Suite 1200, Denver, Colorado, before Leslie D. Montano, Professional Reporter and Notary Public within Colorado.

* * *

[p. 22] whether or not to bid or offer a quotation? What are the factors that you think about when you hear about these projects, and I'll start at the federal level?

A. Are you asking, who do I give my prices to?

Q. No. I'm asking if you're reading in the *Daily Journal* you probably hear about a lot of projects; is that correct?

A. Yes.

Q. How do you decide which ones –

A. That we will submit a bid on?

Q. – that you're going to submit a – and we're talking about as a subcontractor. So on which projects would you submit quotations to prime contractors?

A. We submit a bid on every job we see.

Q. Every job that involves guardrail?

A. On every job that involves guardrail, yes. If there is guardrail on the job, we bid it, if it's in the State of Colorado. If it isn't in the State of Colorado, we will decide if we are or not going to bid on it and if we're not busy enough. Like I say, we are only qualified in Kansas. And we have never done any work in Kansas since we have been qualified in Kansas. So if it's in Colorado, we bid [p. 23] the job.

Q. Have you submitted a bid on a project or submitted a quotation on a project to a prime contractor in Kansas?

A. Yes, we have.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 90-C-1413

ADARAND CONSTRUCTORS,

Plaintiff,

vs.

SAMUEL K. SKINNER, Secretary of the Department of Transportation; ROBERT E. FARRIS, Administrator of the Federal Highway Administration; LOUIS N. MACDONALD, Administrator of Region VIII of the Federal Highway Administration; and JERRY BUDWIG, Division Engineer of the Central Federal Lands Highway Division,

Defendants.

DEPOSITION OF JERRY BUDWIG
MARCH 19, 1991

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* * *

[p. 34] Q. Are you – you are familiar with the regulations in 48 CFR 19.703, and I know you don't know what the number means, and that's all right, I do, that's more for the attorneys than for you, dealing with the groups that are presumed to be disadvantaged?

A. I would say generally that I am familiar with that.

Q. And you recognize that generally to be presumed disadvantaged it takes a certain racial classification to be presumed to be disadvantaged?

A. That, and I think women are considered to be disadvantaged too somehow or another.

Q. And I would agree that that's included in some of the laws.

A. Yeah. I'm not sure if it's in there, I don't know, but I think they come under the clause.

Q. Okay. Do you know of anyone other than women that's a DBE in the state of Colorado that does not fit the description of presumed disadvantaged?

A. No.

Q. Do you know where the authority, legal authority for the subcontracting compensation clause comes from?

A. No.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 90-C-1413

ADARAND CONSTRUCTORS,

Plaintiff,

vs.

SAMUEL K. SKINNER, Secretary of the Department of Transportation; ROBERT E. FARRIS, Administrator of the Federal Highway Administration; LOUIS N. MacDONALD, Administrator of Region VIII of the Federal Highway Administration; and JERRY BUDWIG, Division Engineer of the Central Federal Lands Highway Division,

Defendants.

DEPOSITION OF JAMES L. ROBINSON
MARCH 19, 1991

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* * *

[p. 8] program and came here.

Q. Okay. Now, the time and motion maintenance program you talked about in Iowa, did that have to do with maintenance of highways?

A. Yes.

Q. Okay.

A. Following snowplows around and timing them, that sort of thing.

Q. What is your current position with the Central Division?

A. My current position is contract administration engineer. I'm in the construction branch of the Central Federal Lands Highway Division.

* * *

[p. 74] Q. And under a normal contract situation, which areas could you expect subcontracts to be let on, or are there areas that meet that, I'm –

A. It can be almost anything. Take for example a project that includes both grading and paving, we can get a low bidder or get a contractor who is a grading contractor who will sub out the paving; conversely our low bidder may be a paving contractor that subcontracts the paving or same with bridges it can come in both ways.

(Mr. Rippley entered the room)

Q. (By Mr. Welch) Okay. Do –

A. Beyond that, very commonly the smaller [p. 75] dollar items are subbed out, such as traffic control, fencing, guardrails, that's that sort of thing, they are frequently subbed. There can be any number of combinations.

* * *

[p. 102] area, wouldn't it?

A. Sure, if more potential subs are around it takes less effort to find one and award a subcontract.

Q. Under the subcontract compensation clause it provides that one of the reasons for the extra money is they may have to report on what they've actually done. Have you required reports?

A. Not to my knowledge, we haven't.

Q. Are you the one that would have required those reports?

A. For the last 15 months I probably would be, yes.

Q. Okay.

A. I have not.

Q. Would you describe the subcontracting compensation clause as mandatory?

A. Mandatory in what sense? Who is required to do what?

Q. In the sense that it's required to be a part of the contract.

A. We've received instructions from our headquarters that have told us to put it in all sealed bid contracts.

Q. Okay. Who – and this is a part of the

* * *

[p. 105] Q. But during that time you don't know whether or not it changed significantly one way or another?

A. No, I don't.

Q. Do you know what it means – do you know what I mean by presumptively disadvantaged pursuant to the regulations?

A. I believe so, that's the certain racial identifications?

Q. Yes, sir.

A. Okay.

Q. Do you know of any certified DBEs that are not presumptively disadvantaged?

A. I'm not aware of any.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 90-C-1413

ADARAND CONSTRUCTORS,

Plaintiff,

vs.

SAMUEL K. SKINNER, Secretary of the Department of Transportation; ROBERT E. FARRIS, Administrator of the Federal Highway Administration; LOUIS N. MacDONALD, Administrator of Region VIII of the Federal Highway Administration; and JERRY BUDWIG, Division Engineer of the Central Federal Lands Highway Division,

Defendants.

DEPOSITION OF CRAIG ACTIS
MARCH 19, 1991

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* * *

[p. 5] other. I will try not to ask questions until you are finished answering, and if you will wait until I'm done asking, okay?

A. Okay.

Q. The other thing is that "uh-huh" and "huh-uh" and this (indicating) doesn't work. You have to respond verbally so he can put it down, okay?

A. Okay.

Q. Please state your full name.

A. Craig Michael Actis.

Q. Where do you currently reside?

A. Arvada, Colorado.

Q. And where are you currently employed?

A. Federal Highway Administration, Central Federal Lands Highway Division.

Q. And what's your current position?

A. Contract development engineer.

* * *

[p. 16] A. No, not that I can think of.

Q. Are you familiar with the term "presumptively disadvantaged"?

A. No, I'm not.

Q. The regulations discuss certain groups that are considered DBEs, and they have a presumption on being disadvantaged because of their race.

A. Uh-huh.

Q. Are you familiar with those groups within that provision?

A. Provision in the Federal Acquisition Regulations?

Q. Yes.

A. Yes.

Q. That deals with Blacks and Hispanics and Aleuts and American Indians and those groups?

A. Yes, I'm familiar with the provision in the Federal Acquisition Regulation.

Q. Do you know of any DBEs in the state of Colorado currently that are not presumptively disadvantaged other than women?

A. DBEs as certified by who?

Q. By the state – well, certified by Central Federal?

A. We don't certify DBEs.

[p. 17] Q. Okay. Who certifies them?

A. We accept certification from the state or the Small Business Administration, generally.

Q. With either one of those groups, do you know of any DBEs that don't meet that presumptively disadvantaged requirement?

A. No, I don't.

* * *

(5)

Supreme Court, U.S.
FILED
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No. 93-1841

In the

Supreme Court of the United States

October Term, 1994

ADARAND CONSTRUCTORS, INC.,
Petitioner,

v.

FEDERICO PENA, Secretary of Transportation, et al.,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Tenth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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for the Tenth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

IDENTITY AND INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of petitioner, Adarand Constructors, Inc. (Adarand). Written consent to the filing of this brief has been granted by counsel for all parties. Copies of the letters of consent have been lodged with the Clerk of this Court.

PLF is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest. Policy is set by a Board of Trustees composed of concerned citizens, many of whom are attorneys. PLF's Board evaluates the merits of any contemplated legal action and authorizes such legal action only where the Foundation's position has broad support within the general community. PLF's Board has authorized the filing of an amicus curiae brief in this matter.

Amicus is submitting this brief because it believes its public policy perspective and litigation experience opposing race-based decisions by government agencies will provide an additional viewpoint with respect to the constitutional issues presented. PLF has participated in numerous cases involving issues arising under the Fifth and Fourteenth Amendments to the United States Constitution. Amicus believes the lower court's opinion poses a serious threat to the fair administration of federal highway projects because the race-based presumption of disadvantage contained in the Subcontracting Compensation Clause (SCC) induces prime contractors to hire minorities solely on the basis of race, rather than other more relevant factors such as experience, financial strength, and bid amount. As such, the SCC violates fundamental notions of fairness.

OPINION BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is reported at 16 F.3d 1537 (10th Cir. 1994).

STATEMENT OF THE CASE

This case presents two issues: (1) whether the level of scrutiny for racial classifications should depend on the governmental entity establishing the classification; and (2) whether the race-based classifications for awarding highway construction contracts which are imposed to remedy broad-based societal discrimination, rather than clearly identifiable discrimination perpetuated by a state or its political subdivision withstand the applicable level of scrutiny.

The issues arose when the Central Federal Lands Highway Division (CFLHD) issued a solicitation for bids for the construction of a 4.7 mile section of highway to be located in the San Juan National Forest (West Dolores Project) in Southern Colorado. The SCC provision in the contract authorized payment of a monetary bonus to all prime contractors who hire subcontractors certified as Disadvantaged Business Enterprises (DBEs) to perform work amounting to more than 10% of the overall contract amount. DBE certification is attained by proving that the business is at least 51% owned by one or more "socially and economically disadvantaged" individuals. Minorities are presumed to be both socially and economically disadvantaged, regardless of whether they are actually disadvantaged. 15 U.S.C. § 637(d)(3)(C). Conversely, businesses owned or operated by white males are not presumed to be disadvantaged, irrespective of existing adverse social or economic factors. In fact, the race and ethnic criteria for establishing social disadvantage effectively precludes a white male owned business from ever attaining DBE certification.

After the CFLHD awarded the prime contract for the West Dolores Project to Mountain Gravel & Construction Company (Mountain Gravel), Adarand Constructors (Adarand), a construction company owned and managed by a white male, then submitted the lowest bid for the guardrail portion of the project to Mountain Gravel. Mountain Gravel awarded the subcontract to Gonzales Construction Company because Gonzales' DBE certification qualified Mountain Gravel to receive the SCC bonus payment, which more than offset the additional cost of hiring Gonzales.

Adarand filed suit in the United States District Court for the District of Colorado, challenging the constitutionality of the SCC by asserting that the SCC program violates the right of equal protection component of the Due Process Clause of the Fifth Amendment. After Cross Motions for Summary Judgment were filed, the District Court granted the United States' Motion for Summary Judgment.

Adarand subsequently filed a Notice of Appeal with the Tenth Circuit Court of Appeals. The Tenth Circuit upheld the validity of the race-based preference in the SCC.

SUMMARY OF ARGUMENT

In *City of Richmond v. Croson*, this Court recognized that all racial classifications must be subject to strict scrutiny. This assertion is not qualified by the identity of the originating governmental body. Contrary precedent of *Fullilove v. Klutznick*, 448 U.S. 448 (1980), and *Metro Broadcasting, Inc. v. Federal Communications Commission*, 497 U.S. 457 (1990), which might suggest a lower level of scrutiny for Congressional actions does not apply to this case.

The SCC's race-based presumption of disadvantage contained in 15 U.S.C. § 637 violates nonminority individuals' constitutional rights. As recognized by Justice Powell, "this Court has never approved race-conscious remedies absent judicial, administrative, or legislative findings of constitutional or statutory violations." *Fullilove v. Klutznick*, 448 U.S. at 497 (Powell, J., concurring). In this case there was no finding that there had ever been discrimination in the highway construction industry in Colorado. The policy behind the SCC is to provide subcontracting opportunities for small disadvantaged business enterprises. Given the 30-year passage of time since the Civil Rights Act of 1964, minority status alone is no longer sufficient to presume that the minority subcontractor has been both socially and economically disadvantaged, the two requisite criteria for DBE certification. Further, nonminorities are effectively precluded from DBE certification because their nonminority status prevents them from meeting the social disadvantage prong of the DBE certification process. As such, the Section 637 presumption of disadvantage impermissibly infringes nonminorities' constitutional rights to be treated as individuals.

Because there is no finding of prior discrimination in the highway construction industry, the race-based preference policy at issue must be justified by some other compelling governmental interest, none of which is apparent from the face of the legislation. Nor is the SCC program "narrowly tailored." First, it is not linked to identified discrimination and, second, race-neutral alternatives exist which would more adequately serve the policy underlying the SCC. Accordingly, the Section 637 presumption of disadvantage cannot withstand the strict scrutiny standard for ensuring compliance with equal protection guarantees.

Absent a supportable finding of prior discrimination, a government-imposed racial preference is clearly an arbitrary and capricious act and itself constitutes invidious discrimination. The equal protection guaranty protects individual rights and does not countenance group preference merely to obtain racial balance. For these reasons, the judgment below must be reversed.

ARGUMENT

I

THE STRICT SCRUTINY STANDARD OF REVIEW SHOULD APPLY FOR ALL RACE-BASED PROGRAMS, REGARDLESS OF ORIGIN

The constitutional challenge to the SCC's race-based presumption of disadvantage has properly been brought under the implied equal protection guarantee of the Fifth Amendment. This program, as well as all race-conscious programs, must be reviewed under the strict scrutiny test.

A. Strict Scrutiny Is the Appropriate Standard of Review for All Race-Conscious Programs

Amicus believes that all remedies based on a racial classification are subject to the most searching examination. This includes a race-conscious program approved by the federal government or a state or local government. The strict scrutiny standard has been traditionally used when examining "suspect" classifications based on race or national origin. The purpose of strict scrutiny is to "smoke out" illegitimate uses of race by assuring that the governmental body is pursuing a goal important enough to warrant use of a highly suspect tool. The test also ensures that the means

chosen "'fit' this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype."[1] Strict scrutiny analysis requires the satisfaction of two prongs. First, any racial classification must be justified by a compelling governmental interest and, second, the means chosen by the government to effectuate its purpose must be narrowly tailored to meet that goal.[2]

The decision in *Korematsu v. United States of America*, 323 U.S. 214 (1944), provided an earlier constitutional analysis of equal protection. In that case, the Court upheld, by a six to three vote, the wartime restrictions on residents of Japanese origin but indicated that classifications based on race or national origin would not be consistent with the principles of the equal protection guarantee absent compelling governmental interest. This opinion established the basis for the standard of review of classifications based on race:

> It should be noted, to begin with, that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes

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[1] *City of Richmond v. J. A. Croson Company*, 488 U.S. 469, 493 (1989) (plurality opinion of O'Connor, J.).

[2] *Wygant v. Jackson Board of Education*, 476 U.S. 267, 274, 285 (1986) (plurality opinion); *Croson*, 488 U.S. at 493 (plurality opinion).

> justify the existence of such restrictions; racial antagonism never can.

Korematsu, 323 U.S. at 216.

This Court has rarely swayed from this standard of review when confronted with a classification based on race. "'Racial, and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination.'" *Wygant*, 476 U.S. at 273 (plurality opinion of Powell, J., Burger, C.J., Rehnquist and O'Connor, JJ. (quoting *Regents of the University of California v. Bakke*, 438 U.S. 265, 291 (1978))). In *Croson*, a majority of this Court held that race-based programs are suspect classifications subject to strict scrutiny by the courts. *Croson* (plurality opinion of O'Connor, J., joined by Rehnquist, C.J., and White and Kennedy, JJ., 448 U.S. at 493; Scalia, J., concurring at 520).

B. Federally Approved Race-Conscious Programs Should Be Examined Under the Strict Scrutiny Standard

Amicus believes that the same analysis should apply regardless of whether a constitutional challenge to a race-conscious program is brought under the Fifth Amendment due process guarantee or the Fourteenth Amendment equal protection guarantee. The guaranty of equal protection prohibits the government from discriminating between individuals or groups on an illicit basis. This is consistent with this Court's earlier cases recognizing that there is no significant distinction between such limitations on the federal government and limitations on a state and local government. Even federal programs which are claimed to be remedial in nature are subject to strict scrutiny if they employ racial classifications because of the need to ensure that such

measures are being used to further the stated remedial interest and are being used no more broadly than the remedy demands.[3]

Since *Bolling v. Sharpe*, 347 U.S. 497 (1954), a companion case to *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954), the Court has been consistent in holding that the Due Process Clause of the Fifth Amendment has an equal protection component which applies to the federal government in the same way as the Equal Protection Clause of the Fourteenth Amendment applies to the states. In *Bolling*, the Court invalidated segregation of public schools in the District of Columbia, finding that racial segregation violates the Due Process Clause. The Court explained the relationship of the Fifth and Fourteenth Amendments:

> The Fifth Amendment, which is applicable in the District of Columbia, does not contain an equal protection clause as does the Fourteenth Amendment which applies only to the states. But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The "equal protection of the laws" is a more explicit safeguard of prohibited unfairness than "due process of law," and, therefore, we do not imply that the two are always interchangeable phrases. But, as this Court

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[3] *Metro*, 497 U.S. at 611 (O'Connor, J., dissenting) (citing *Croson*, 488 U.S. at 493-95, 498-502, and *Wygant*, 476 U.S. 267).

> has recognized, discrimination may be so unjustifiable as to be violative of due process.

347 U.S. at 499 (footnote omitted).

This recognition of an equal protection component within the Due Process Clause of the Fifth Amendment and Fourteenth Amendment renders Fifth Amendment and Fourteenth Amendment equal protection analyses indistinguishable.[4] Regardless of whether the issue before the Court involves traditional discrimination or reverse discrimination, the standard of scrutiny is the same. The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color.[5] As to the person whose equal protection rights are being denied, the source of discrimination is irrelevant, since the extent of denial is not

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[4] *See Buckley v. Valeo*, 424 U.S. 1, 93 (1976) ("[e]qual protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment"); *see also United States v. Paradise*, 480 U.S. 149, 166 n.16 (1987) ("the reach of the equal protection guarantee of the Fifth Amendment is coextensive with that of the Fourteenth"); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975); *Johnson v. Robinson*, 415 U.S. 361, 364-65 n.4 (1974); *Bolling v. Sharpe*, 347 U.S. at 499-500; *Metro Broadcasting, Inc. v. Federal Communications Commission*, 497 U.S. at 604 (O'Connor, J., dissenting) ("[t]he Constitution's guarantee of equal protection binds the Federal Government as it does the States, and no lower level of scrutiny applies to the Federal Government's use of race classifications").

[5] *Croson*, 488 U.S. at 494 (plurality opinion of O'Connor, J., Rehnquist, C.J., White and Kennedy, JJ.) (quoting *Bakke*, 438 U.S. at 289-90).

diminished because the discrimination is sanctioned by federal rather than state authority.

In *Shapiro v. Thompson*, 394 U.S. 618 (1969), this Court was confronted with the imposition of residency requirements for welfare eligibility which had been authorized by Congress in Section 402(b) of the Social Security Act. Writing for the majority, Justice Brennan ruled first that the state residency requirements impinged upon the fundamental right to travel and was not supported by a compelling state interest, second, that "Congress may not authorize the States to violate the Equal Protection Clause," *id.* at 641, and third, that the District of Columbia's residency requirement was a "discrimination ... 'so unjustifiable as to be violative of due process.'" *Id.* at 642 (quoting *Schneider v. Rusk*, 377 U.S. 163, 168 (1964)). The equal protection test stated in *Shapiro* required the application of the strict scrutiny standard of review whenever a classification impinged upon a suspect class or upon a fundamental interest. 394 U.S. at 629.

In *Weinberger v. Wiesenfeld*, 420 U.S. 636, this Court reaffirmed: "This Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment." *Id.* at 638 n.2. Again in *Regan v. Taxation With Representation*, 461 U.S. 540, 542 n.2 (1983), this Court stated: "The Due Process Clause imposes on the Federal Government requirements comparable to those that the Equal Protection Clause of the Fourteenth Amendment imposes on the States." Only twice has this Court departed from the recognized unity of the Fifth Amendment and Fourteenth Amendment equal protection analyses: *Fullilove v. Klutznick*, 448 U.S. 448, which was decided before *Richmond v. Croson*, and *Metro Broadcasting v.*

Federal Communications Commission, 497 U.S. 547, which presented issues that negate its precedential value.

1. Metro Broadcasting v. FCC Is Not Relevant Precedent to the Case at Bar

In *Metro Broadcasting v. Federal Communications Commission*, underlying First Amendment concerns existed which were sufficient to preclude that decision from application to the case at bar. The issue before the Court in *Metro* concerned an FCC "distress sale" policy which promoted minority ownership of broadcast stations by allowing a broadcast licensee, under certain conditions, to assign its license to an FCC-approved minority enterprise without a hearing. The program was challenged as being violative of the equal protection component of the Due Process Clause of the Fifth Amendment. In a 5-4 decision, this Court upheld the program, but inherent in the reasoning of the Court was the recognition that the public interest aspect of the FCC's role "necessarily invite[d] reference to First Amendment principles." *Metro*, 497 U.S. at 567 (citations omitted). The Court noted that "the scarcity of [electromagnetic] frequencies [permits] the Government ... to put restraints on licensees in favor of others whose views should be expressed on this unique medium.'" *Id.* at 566-67 (brackets in original; brackets added; citations omitted). Justice O'Connor took exception to the reliance of the majority on the notion "that a particular and distinct viewpoint inheres in certain racial groups, and that a particular applicant, by virtue of race or ethnicity alone, is more valued than other applicants because [that applicant is more] 'likely to provide [that] distinct perspective.'" *Metro*, 497 U.S. at 618 (brackets added; brackets in original) (O'Connor, J., dissenting). As Justice O'Connor and several others on this Court have recognized, racial classifications

must never be characterized as "routine legislation" and must be subjected to a strict standard of scrutiny.[6]

While amicus questions the underlying logic which prompted the majority in *Metro* to deviate from *Bolling* and its progeny, and strongly urges this Court to reconsider the tenuous reasoning of that case, the *Metro* decision is of no moment in the case at bar. Unlike *Metro*, this case does not present conflicting constitutional problems because the viewpoint dissemination issues which so concerned the majority in the *Metro* decision are not now before the Court. *Metro* is not relevant precedent because of the unique nature of the FCC's role in protecting the public interest and should, therefore, not be construed as limiting the scope of *Croson*. For very different but no less significant reasons, *Fullilove v. Klutznick* is also not controlling in this case.

2. Fullilove v. Klutznick Is Not Relevant Precedent to the Case at Bar

Fullilove was decided nine years prior to this Court's decision in *Croson* which determined that strict scrutiny applies to all preferences that favor members of minority groups. *Metro*, 497 U.S. at 609 (O'Connor, J., dissenting). Consequently, the precedential power of *Fullilove* is suspect. Even if the Court finds that *Fullilove* raises issues of stare decisis, the challenged SCC program is distinguishable from the Minority Business Enterprise (MBE) set aside considered by the *Fullilove* Court because the SCC program is not a

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[6] *Metro*, 497 U.S. at 603 (O'Connor, J., Rehnquist, C.J., Scalia and Kennedy, JJ., dissenting) (urging strict scrutiny for all racial classifications, including those contained in the challenged FCC distress sale); *id.* at 634 (Kennedy and Scalia, JJ., dissenting).

remedy for identified past discrimination and impacts individuals rather than states or their political subdivisions.

a. The Race-Based Presumption of Disadvantage Does Not Remedy Identified Past Discrimination Because It Is Not Victim Specific

In considering the applicability of *Fullilove* in light of *Croson*, Justice O'Connor said that "Fullilove applies at most only to congressional measures that seek to remedy identified past discrimination." *Metro*, 497 U.S. at 607 (O'Connor, J., dissenting). Others on the Court have also indicated that Congress must select a means which is victim specific in order to remedy the present effects of past discrimination.[7] A review of the original legislation which served as the model for the SCC, *Adarand Constructors, Inc. v. Pena*, 16 F.3d at 1546, and was upheld in *Fullilove*, indicates that the SCC is not true to the underlying goals of the legislation because it does not remedy identified past discrimination.

In 1977, Congress enacted the Public Works Employment Act as a means of directing federal funds into the minority business community in order to provide economic stimulus. *Fullilove*, 448 U.S. at 458-59 (opinion of Burger, C.J., joined by White and Powell, JJ.). This Act

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[7] *Fullilove*, 448 U.S. at 487 (opinion of Burger, C.J.) (stating that benign racial or ethnic classifications can have deleterious effects when they stray from narrow remedial justifications, and must therefore be limited to accomplishing the remedial objectives of Congress); *Id.* at 510 (Powell, J., concurring) ("I believe that Congress' choice of a remedy should be upheld [if it] redress[es the] identified discrimination").

was a continuation of a short-term program which was prompted by a problem of national unemployment. *Id.* at 456-57. The 1977 Act included, in part, a mandatory set-aside provision that 10% of the work must come from Minority Business Enterprises, but included a waiver provision for situations where 10% minority participation was not feasible. *Id.* at 459. In considering the mandatory nature of the 1977 amendment, Congress heard testimony that "'every agency of the Government has tried to figure out a way to avoid'" allocating funds to the minority business community. *Id.* at 461 (quoting 123 Cong. Rec. 5329 (1977)) (remarks of Rep. Mitchell). The dearth of minority business participation in government contracting was due to the "longstanding existence and maintenance of barriers impairing access by minority enterprises to public contracting opportunities, or sometimes as involving more direct discrimination." *Id.* at 463. So the MBE set-aside provision was enacted to rectify this disparity of contracting opportunities and, as such, was deemed by the *Fullilove* Court as sufficient to invoke its authority under Section 5 of the Fourteenth Amendment. *Id.* at 463. The challenged program was only an experimental "pilot project" however, and placed conditions upon states' ability to qualify for federal funds.[8] The allocation of the initial burden of

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[8] "Congress, after due consideration, perceived a pressing need to move forward with new approaches in the continuing effort to achieve the goal of equality of economic opportunity. In this effort, Congress has necessary latitude to try new techniques such as the limited use of racial and ethnic criteria to accomplish remedial objectives; this is especially so in programs where voluntary cooperation with remedial measures is induced by placing conditions on federal expenditures." *Fullilove*, 448 U.S. at 490 (opinion of Burger, C.J., joined by White and Powell, JJ.).

compliance to the recipient of the federal funds was an important factor in Congress' passing of the legislation. *Id.* at 461. Significantly, the project was deemed to be solely remedial because a waiver provision limited its reach. In upholding this experimental program, Chief Justice Burger observed that it "press[ed] the outer limits of congressional authority." *Id.* at 490.

In contrast, the DBE certification procedure includes a presumption of disadvantage which negates any assurance that the challenged program will remedy identified past discrimination. DBE certification is accomplished by a showing that the applicant has been economically disadvantaged by virtue of an impaired "ability to compete in the free enterprise system ... due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged." 15 U.S.C. § 637(a)(6)(A).[9] So the threshold step for achieving DBE certification is establishing social disadvantage. Nonminorities are definitionally precluded from establishing social disadvantage because only "those who have been subjected to *racial or ethnic prejudice or cultural bias because of their identity as a member of a group* without regard to their individual qualities," are defined as socially disadvantaged. 15 U.S.C. § 637(a)(5) (emphasis

[9] While Section 637(a) of the Small Business Act (SBA) does not presume that minorities are disadvantaged, Section 637(d) employs the same language as Section 637(a), and does contain a race-based presumption of disadvantage. Congress has never taken issue with the SBA's presumption of disadvantage and respondents have stipulated that the Small Business Act establishes such a presumption. Respondents' opposition to petition at 6 n.6. Therefore, this presumption is properly before the Court, regardless of the language of Section 637(a).

added). Consequently, nonminorities may never qualify as DBEs because failure to establish social disadvantage ends the inquiry.[10]

In defining social and economic disadvantage, minorities are presumed to be both socially and economically disadvantaged, regardless of individual upbringing, capital resources, prior affirmative action program participation, or social benefits. 15 U.S.C. § 637(d)(3)(C). This presumption enables a minority applicant to simply claim DBE status without any substantiation,[11] and thereby receive the benefits of the SCC program. This presumption is a momentous change from the program upheld in *Fullilove*, which rightfully placed the burden of compliance squarely on the shoulders of the beneficiary.[12] Congress was clear in its

[10] "Recipients should always make a determination of social disadvantage before proceeding to make a determination of economic disadvantage. If the recipient determines that the individual is not socially disadvantaged, it is not necessary to make the economic disadvantage determination." 49 C.F.R. Pt. 23, Subpt. D, App. C (1992).

[11] "In making certification decisions, the recipient ... relies on this presumption, and does not investigate the social or economic status of individuals who fall into one of the presumptive groups." 49 C.F.R. Pt. 23, Subpt. D, App. A, at 216.

[12] *Fullilove*, 448 U.S. at 464 n.44 (citing the pertinent provisions of Section 8(a) of the SBA program, in which the applicant must identify with the disadvantages of his or her racial group generally, and must have personally been affected by these disadvantages such that the applicant's ability to enter into the mainstream of the business system

(continued...)

intent that the term "minority" only included such "'minority individuals as [were] considered to be economically or socially disadvantaged.'" *Fullilove*, 448 U.S. at 471 (opinion of Burger, C.J., joined by White and Powell, JJ.) (citation omitted).

b. The SCC Exceeds the Scope of Congress' Section 5 Authority as Recognized in Fullilove Because It Impacts Individuals Rather Than States

Section 5 of the Fourteenth Amendment grants Congress the power to enforce the provisions of the amendment by appropriate legislation. U.S. Const. Amend. XIV, Section 5. While the various opinions in *Fullilove* considered many sources of congressional authority upon which to base the propriety of the challenged program, it is "clear that it was § 5 that led the Court to apply a different form of review to the challenged program." *Metro*, 497 U.S. at 606 (O'Connor, J., joined by Rehnquist, C.J., and Scalia and Kennedy, JJ., dissenting). As has been previously noted, the MBE program which the *Fullilove* Court upheld pressed the outer limits of congressional authority. Aside from its nonremedial nature, the SCC also exceeds the limits of congressional Section 5 authority because it does not act with respect to the states, a prerequisite for Section 5 authority. Admendment XIV, Section 1. While the MBE program in *Fullilove* concerned the ability of a *state* to receive federal funds, the DBE program under review here concerns incentive payments to *individuals* who employ certified DBE's. This is hardly the

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[12] (...continued)
was hampered). "'Membership alone in any group is not conclusive that an individual is socially disadvantaged.'" *Id.*

type of "oversight of certain of the States' actions" which this Court has recently endorsed. *Metro*, 497 U.S. at 606 (citing *Croson*, 488 U.S. at 488-91 (opinion of O'Connor, J., Rehnquist, C.J., and White, J.)).

The requirement that congressional action brought under Section 5 speak to the states is illustrated by the cases which challenged the Voting Rights Act of 1965. This Act suspended the use of literacy tests in certain jurisdictions where it found serious racial discrimination in voting. Literacy tests were suspended even in localities within these jurisdictions where courts had not found actual voting discrimination through the use of literacy tests. In *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), the constitutionality of this broad suspension of literacy tests by Congress was challenged. The Court found that Congress had the power to prohibit *state* action which perpetuated the effects of past intentional discrimination. *Id.* at 325. Similarly, in *Rome v. United States*, 446 U.S. 156 (1980), the Act was upheld even though it was being applied to prevent a race-neutral annexation in the City of Rome, Georgia. The Court held that when there has been a history of intentional race discrimination, Congress could prohibit race-neutral electoral system changes which had a discriminatory impact. In each of these cases, the legislation spoke to state or local government, not individuals. Conversely, the challenged SCC speaks to individuals, not state or local government. Not insignificantly, the SCC provides incentives to individuals to do the very thing which 42 U.S.C. § 1981 was enacted to prevent: discrimination in private contracting against individuals solely on account of race or ethnicity.

The DBE program lacks the prerequisite characteristics for exercising Section 5 power because it does not remedy identified past discrimination and speaks to

individual rather than state actions. As a consequence, the basis for the Court's judgment in *Fullilove*, whatever it may have been, is absent today. Racial classifications enacted under non-Section 5 powers, as noted above, must not violate the equal protection guarantees and the standard for measuring such compliance is the strict scrutiny standard of *Croson*.

Amicus considers the precedential value of *Fullilove* to be minimal in light of *Croson*, and finds the precedential value of *Metro* to be undermined by the First Amendment concerns of the majority. Amicus urges this Court to adopt one standard in examining all race-based preference programs, regardless of origin. A strict scrutiny standard of review would be in complete harmony with the goal of a color-blind society free from racial bias.

II

THE SCC CANNOT PASS STRICT SCRUTINY BECAUSE IT IS NOT WELL TAILORED AND THERE HAVE BEEN INSUFFICIENT FINDINGS TO JUSTIFY THE USE OF RACIAL CLASSIFICATIONS

Section 5 of the Fourteenth Amendment grants to Congress the power to enforce the Equal Protection Clause of the Fourteenth Amendment. Because this unique power gives "Congress a particular, structural role in the oversight of certain of the States' actions," *Metro*, 497 U.S. at 606 (O'Connor, J., dissenting) (citing *Croson*, 488 U.S. at 488-91), this Court has followed a different form of review for remedial legislation enacted pursuant to Section 5. *Fullilove*, 448 U.S. at 479 (opinion of Burger, C.J.). The racial classification considered by the *Fullilove* Court was upheld under this different form of review. Amicus contends that, unlike the set-aside provision considered in *Fullilove*,

Section 5 authority is lacking in this case because there has been no showing of state-sponsored discrimination warranting a remedy and, in any event, the SCC impacts individual actions, rather than state actions.

A. The SCC Is Not Narrowly Tailored Because There Are Inadequate Limits to the Applicability of the SCC's Presumption of Disadvantage

The express underlying purpose of the SCC is to benefit DBEs. However, it is the procedure for DBE certification which indicates that the SCC is a thinly veiled apparatus for discriminating against nonminorities to the benefit of minority enterprises, regardless of economic disadvantage. Such an apparatus does not merely press the limits of congressional authority which were strained by the MBE set-aside program considered in *Fullilove*, it shatters these limits by ignoring them completely.

The clear intent of Congress, as noted by the *Fullilove* Court, that the term "minority" only include those minorities who were truly economically or socially disadvantaged, is defeated by the presumption of disadvantage contained in the challenged program before the Court. Section 637 defines "economically disadvantaged" as the inability of a socially disadvantaged (*i.e.*, minority) individual to compete with a nonsocially disadvantaged (*i.e.*, nonminority) individual. Absent a causal link between an applicant's minority status and economic disadvantage, that minority applicant should be on the same footing as an economically disadvantaged nonminority applicant: Both are economically disadvantaged for reasons other than race or ethnicity.

The DBE certification procedure contrasts greatly with the MBE set-aside program upheld by the splintered

Fullilove Court. In *Fullilove* the program was upheld largely due to the existence of a waiver. *Fullilove*, 448 U.S. at 487 (opinion of Burger, C.J.). Grantees were allowed to avoid the minority set-aside requirement by demonstrating that their best efforts would not succeed in achieving the targeted percentage of minority participation. *Id.* at 487-88. The absence of such a waiver from the SCC procedures, as well as the race-based presumption of social disadvantage, indicates a deficiency in the limitations on its application to those for whom the Small Business Act of 1953 was designed to benefit.

Any currently existing minority-owned business which was subject to the traditional discrimination that existed in 1964, when Congress first enacted sweeping civil rights legislation, has benefited from 30 years of affirmative action programs and can no longer be presumed to have suffered from the "diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged."[13] Similarly, those minority-owned businesses which have been in existence for less than 30 years have likewise enjoyed the benefits of affirmative action, without having endured the pre-1964 atmosphere of discrimination and contract preclusion. Therefore, eliminating the presumption of disadvantage would improve the victim specificity of the DBE certification process because it would retard the ability of nondisadvantaged minorities to obtain DBE certification without harming those truly in need of DBE certification.

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[13] 15 U.S.C. § 637(a)(6). Amicus believes that the competitive nature of the construction industry is such that any business which has existed for more than 30 years is not likely to be economically disadvantaged either.

Significantly, the only party who has an incentive to challenge DBE certification under the current program is an unsuccessful competitor.[14] The prime contractor has no incentive because he has either hired the subcontractor in order to receive the SCC bonus, or has simply hired the best subcontractor available, who happens to be a DBE. Amicus believes that this burden is wrongly imposed on competing subcontractors for two reasons: First, subcontractors do not, nor should they be expected to, have the resources or expertise to investigate the individual backgrounds of their minority competitors. Second, such a burden encourages litigation which is, at the very least, counter-productive to the business of highway construction.[15] Amicus believes

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[14] *See* 49 C.F.R. § 23.69(b):

> The recipient's challenge procedure shall provide as follows: (1) Any third party may challenge the socially and economically disadvantaged status of any individual (except an individual who has a current 8(a) certification from the Small Business Administration) presumed to be socially and economically disadvantaged if that individual is an owner of a firm certified by or seeking certification from the recipient as a disadvantaged business.

[15] The competitor who challenges a competitors eligibility for DBE status is in a no-win situation because such a challenge will not endear the challenger to the prime contractor, who will likely lose the SCC bonus payment as a result of the challenge, and the cost of the challenge will have to be recouped somehow--most likely through higher bids on future contracts, which will lessen the challenger's chance of being awarded those contracts.

that these deficiencies in the DBE certification procedure are fatal to a defense that the SCC withstands strict scrutiny. Additionally, the lack of findings of specific discrimination negate any applicability of Section 5 authority in this case.

B. The Race-Based SCC Bonus Provision May Not Be Applied to the Highway Construction Industry Because There Have Been Insufficient Findings of Discrimination

The rights created by the Fourteenth Amendment enure to individuals, not racial classes, *Shelley v. Kraemer*, 334 U.S. 1 (1948); therefore the authority of Section 5 extends only to the extent necessary to protect individual rights. The Fourteenth Amendment commands: "No State shall ... deny to any *person* within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV, Section 1 (emphasis added). This Court has remained true to the text of the Fourteenth Amendment in recognizing that the rights created by the first section of the Fourteenth Amendment are *personal* rights, guaranteed to the individual. *Shelley v. Kraemer*, 334 U.S. at 22. As such, the enforcement authority granted Congress by Section 5 of the Fourteenth Amendment is only appropriate when there are findings of specific instances of discrimination by a state or political subdivision. As Justice O'Connor has found: "[A]n amorphous claim that there has been past discrimination in a particular industry cannot justify the use of an unyielding racial quota." *Croson*, 488 U.S. at 499 (O'Connor, J., joined by Rehnquist, C.J., White and Kennedy, JJ.). It follows then that mere generalized assumptions of discrimination are insufficient to warrant Section 5 remedies.

The common denominator in the various opinions concerning Section 5 authority is the prerequisite that a state or political subdivision has *acted* in such a way as to deprive

an individual of equal protection of the law.[16] So absent denial or invasion of equal protection of the law by a state or local government, whether intentional or by passive participation in racial exclusion by private parties, Section 5 is not a source of authority for congressional action in this case. The widespread discrimination which spawned the Civil Rights Act of 1964 and other legislation authorizing affirmative action might have justified deference to Congress, for a period of time subsequent to 1964, in assuming "that in the past some nonminority businesses may have reaped competitive benefit over the years from the virtual exclusion of minority firms from ... contracting opportunities." *Fullilove*, 448 U.S. at 484-85. Amicus believes, however, that the societal gains made over the last 30 years have resulted in greater public awareness of the evils associated with racial discrimination. To be sure, racial discrimination has not been, and may never be, completely eliminated from society. But there is less likelihood today that state-sponsored discrimination is so pervasive as to require nonspecific remedial legislation by Congress. The benefit which minority-owned businesses have reaped over the past 14 years since the MBE set-aside program was approved in *Fullilove* are such that the "barriers impairing access to minority enterprises [that were] extant for so long," *Id.* at 463, are no longer present, nor have they been for a number of years.

Racial classifications by any governmental entity threaten the color-blind ideal upon which the Fourteenth

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[16] For example, in *Mississippi University for Women v. Hogan*, 458 U.S. 718, 732 (1982), the Court noted that Section 5 grants power "'to secure ... equal protection of the laws against State denial or invasion.'" (Quoting *Ex Parte Virginia*, 100 U.S. 339, 346 (1880).)

Amendment rests. As Justice Powell has said, "[t]he time cannot come too soon when no governmental decision will be based upon immutable characteristics of pigmentation or origin." *Fullilove*, 448 U.S. at 516 (Powell, J., concurring). It is, therefore, not unreasonable to require Congress to make findings of state-sponsored discrimination that are sufficiently definite to ensure that the remedy addresses the problem in a way that does not equate to unlawful federal-sponsored discrimination. Amicus is aware that this requirement should not be so stringent as to require "imposition of adjudicatory procedures" to a point that Congress becomes a lower federal court. *Id.* at 503. However, the findings should be specific enough to allow for an effective remedy that is solely remedial in nature. The findings should also be based on evidence that goes beyond much-criticized disparity studies,[17] and instead overcome the fear that Congress "has neither the dispassionate objectivity nor the flexibility that are needed to mold a race-conscious remedy around the single objective of eliminating the effects of past or present discrimination." *Id.* at 527 (Rehnquist and Stewart, JJ., dissenting); *Croson*, 488 U.S. at 522 (Scalia, J., concurring) (noting that these political qualities are doubted in a national legislature). But without some evidence of individual discrimination by a state, Congress is merely remedying the effects of societal discrimination.[18] Constructing an

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[17] *See, e.g.*, George R. LaNoue, *The Disparity Study Shield: Baltimore and San Francisco*, RACIAL PREFERENCES IN GOVERNMENTAL CONTRACTING 69 (1993); George R. LaNoue, *Social Science and Minority Set-Asides*, THE PUBLIC INTEREST, Winter 1993.

[18] "There is no reason to assume, and nothing in the legislative history suggests, much less demonstrates, that [minorities are] equally entitled to reparations from the (continued...)

effective remedy for such an injury of nebulous origin would be impossible because the reach of the remedy would be just as indefinite.[19]

No experiment should be allowed to run indefinitely lest its objectives be forgotten. Such is the case with the *Fullilove* pilot program which was the genesis for the SCC. The SCC program as it is currently applied goes beyond the remedial nature of the pilot program upheld in *Fullilove*. The rebuttable presumption of disadvantage in the SCC does not equate to the waiver of the MBE program in *Fullilove* since the burden to rebut is improperly on a third party rather than the beneficiary. There is nothing in the record to show that Congress made any relevant fact findings when it applied the challenged SCC provision to the highway construction industry. While the *Fullilove* Court determined that Congress had sufficient findings to employ racial classifications in 1976, those same findings are not of infinite applicability and should not be found to carry over into all other affirmative action legislation.

Section 5 authority is lacking in this case because neither Colorado nor any political subdivision within

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[18] (...continued)
United States Government." *Fullilove*, 448 U.S. at 538 (Stevens, J., dissenting).

[19] *See Bakke*, 438 U.S. at 307 (Powell, J.) ("'societal discrimination,' [is] an amorphous concept of injury that may be ageless in its reach into the past"); "'[i]n the absence of particularized findings, a court could uphold remedies that are ageless in their reach into the past, and timeless in their ability to affect the future.'" *Croson*, 488 U.S. at 498 (O'Connor, J.) (brackets added) (citing *Wygant*, 476 U.S. at 276).

Colorado has been shown to have engaged in discrimination in the highway construction industry, yet there is no provision which suspends the DBE program in Colorado. Maintenance of the DBE program where there is no evidence of discrimination perpetuates the dangerous stereotypes of inferiority[20] and favoritism which many members of this Court have long sought to eliminate.[21] Logic dictates that voluntary compliance with the Constitution requires no remedial action by Congress. The assertion of Section 5 authority is undercut by the nonremedial nature of the SCC, and is also discredited by the applicability of the SCC to private individuals, rather than any state or political subdivision.

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[20] "'[P]referential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relationship to individual worth.'" *Fullilove*, 448 U.S. at 531 (Stewart and Rehnquist, JJ. dissenting) (brackets in original) (quoting *Bakke*, 438 U.S. at 298).

[21] *See Fullilove*, 448 U.S. at 534 n.5 (Stevens, J., dissenting) (comparing the guidelines of the Economic Development Administration for defining the racial characteristics of beneficiaries with the First Regulation to the Reichs Citizenship Law of November 14, 1935, translated in 4 Nazi Conspiracy and Aggression, Document No. 1417-PS, at 8-9 (1946), which specified the protocol for classifying Jews); *Metro Broadcasting*, 497 U.S. at 634 n.1 (Kennedy and Scalia, JJ., dissenting) (citing same, as well as Population Registration Act No. 30 of 1950, Statutes of the Republic of South Africa 71 (1985)).

CONCLUSION

Forty years have passed since this Court held that segregation violates the equal protection guaranty of the Constitution, whether by a state or the federal government, *See Brown v. Board of Education of Topeka*, 347 U.S. 483 and *Bolling v. Sharpe*, 347 U.S. 497. It has been 30 years since the passage of the Civil Rights Act of 1964, which prohibited private discrimination on the basis of race or ethnicity. The ensuing decades have seen tremendous societal changes as this nation proceeds on its "quest to achieve a society free from racial classification." *Fullilove*, 448 U.S. at 516 (Powell, J., concurring). Five years ago, in *Richmond v. Croson*, 448 U.S. 469, this Court established strict scrutiny as the appropriate level of review for all race-based measures. Such a review is necessary to ensure that racial classifications are effective in remedying the effects of discrimination and are not the result of simple racial politics. *Id.* at 493. The race-based presumption of disadvantage before the Court today is an example of racial politics because Congress had insufficient findings of discrimination to warrant such a highly suspect tool. As such, this presumption is an unconstitutional violation of the petitioner's right to equal protection of the law and is simply wrong. This Court has never held that two wrongs make a right, and only by finding that all racial classifications, regardless of

origin, are subject to strict scrutiny can this Court assure that such a disruptive doctrine does not become the law of this land.

DATED: November, 1994.

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OCTOBER TERM, 1994

ADARAND CONSTRUCTORS, INC.,
Petitioner,

v.

FEDERICO PENA, SECRETARY OF DEPARTMENT OF TRANSPORTATION, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF AMICUS CURIAE OF THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC., IN SUPPORT OF PETITIONER

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BRIEF AMICUS CURIAE OF THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC., IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST OF AMICUS CURIAE

The Associated General Contractors of America, Inc. (AGC) is a nonprofit trade association founded in 1918 to represent and serve the national interests of general construction contractors and other firms associated with the construction industry. AGC has 101 state and local chapters, with at least one chapter serving the general contractors and related firms in each state, and one chapter in Puerto Rico.

AGC has approximately 8,000 regular members and 24,000 associate members. These firms engage in the construction of both residential and non-residential buildings, including multi-family housing projects, office build-

ings, factories, warehouses, and shopping centers. These firms also engage in the construction of highways, bridges, tunnels, airports, dams and other water conservation projects, water works and waste treatment facilities, and defense facilities. AGC members also prepare sites for residential development and install public utilities.

AGC's regular members are prime contractors capable of assuming overall responsibility for the satisfactory completion of a project using their own employees to perform at least part of the work. Most of AGC's associate members are subcontractors. Other associate members are material suppliers and professionals serving the construction industry.

AGC has long supported the many federal and state measures that require open competitive bidding for public construction contracts. These measures typically require interested contractors to submit sealed bids by a specified date and time. They require the government agency to open all bids publicly. And they require the government agency to award the contract to the lowest responsive and responsible bidder.

As the courts have recognized, the purpose of open competitive bidding "is to give all persons equal rights to compete for Government contracts; to prevent unjust favoritism or collusion or fraud in the letting of contracts for the purchase of supplies; and thus to secure for the Government the benefits which arise from competition." *United States* v. *Brookridge Farm*, 111 F.2d 461, 463 (10th Cir. 1940). AGC shares that objective, and therefore continues to support open competitive bidding for public construction contracts.

Discrimination on the basis of race or ethnicity is inconsistent with open competitive bidding, and AGC vigorously opposes such discrimination. In addition, in recognition of historical wrongs, AGC has helped and will continue to help its chapters offer business training

and other assistance to minority firms. AGC's Alabama Branch is, for example, a co-sponsor of the Birmingham Construction Industry Authority, a progressive public/private effort to increase the level of minority business participation in all construction, including private construction. AGC has also tried to help public officials address the practical issues raised by various procurement programs. Without addressing constitutional or other legal issues, AGC in 1982 advised the Federal Highway Administration that the contract clause at issue in this case "appear[ed] to be more realistic than others [then] being specified by various agencies, in that it recognize[d], to some extent, that contractors do indeed incur additional costs when they are contractually required to seek out, develop and train minority firms." Federal Highway Administration Committee Report to the Highway Division (Oct. 4, 1982).

AGC has appeared as amicus curiae in several of this Court's recent cases, including *Metro Broadcasting, Inc.* v. *FCC*, 497 U.S. 547 (1990), and *Building and Construction Trades Council* v. *Associated Builders & Contractors*, 113 S. Ct. 1190 (1993).[1]

SUMMARY OF ARGUMENT

I. Racial preferences in the award of construction contracts by the Federal Government should be subject to strict scrutiny under the equal protection component of the Due Process Clause of the Fifth Amendment. This Court has held that such scrutiny must be applied to racial preferences in the award of construction contracts by state and local governments, *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469 (1989), and there is no reason to apply core principles of equal protection analysis differently to racial preferences in this context depending upon which level of government imposes them.

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[1] This brief is filed pursuant to S. Ct. Rule 37.3 with the consent of the parties. The consent letters have been filed with the Clerk.

The Tenth Circuit below erred in reaching a contrary conclusion on the basis of this Court's opinion in *Metro Broadcasting, Inc.* v. *FCC*, 497 U.S. 547 (1990). While *Metro Broadcasting* did depart from prior precedent and apply a lesser level of scrutiny to certain racial preferences adopted by the Federal Government, it did so in a different context in light of the unique features of the particular preference programs at issue in that case. Those preferences were not justified as a means of benefiting racial or ethnic minorities, but instead as a means of securing the broader benefit to all of diversity of views over the broadcast spectrum—a goal thought to be achieved through diversifying ownership of broadcast stations. No such objective is at issue here; there is and could be no suggestion that the racial identity of the owner of a guardrail construction firm affects how the firm installs the guardrail. In such a case the traditional strict scrutiny test—requiring proof that a racial classification is narrowly tailored to achieve a compelling governmental objective—should be applied.

II. The only interest sufficiently compelling to satisfy strict scrutiny in the context of the award of construction contracts is the need to remedy identified past discrimination. But mere governmental assertions of a remedial objective do not suffice; effective judicial review requires an evidentiary record justifying the racial preference.

A. Statistical evidence submitted to meet this requirement is probative of discrimination only to the extent it (1) identifies and relates to the relevant market; (2) considers only qualified and available firms within that market; (3) controls for such race-neutral, market-relevant variables as firm size and experience; (4) separately analyzes each minority group granted preferential treatment; and (5) identifies the discriminatory practices at fault in the relevant market. Analyses that fail to meet these standards are dubious guides to the existence or extent of discrimination, and should not be relied upon

by courts in considering whether the government's asserted remedial objective satisfies strict scrutiny.

B. Once the objective of remedying identified past discrimination is established, strict scrutiny requires that the challenged racial classification be narrowly tailored to achieve that objective. Narrow tailoring in the present context requires that government (1) carefully consider race-neutral alternatives before embracing the extreme remedy of racial preferences, (2) link any numerical objectives to the capacity of qualified minority firms in the relevant market, (3) limit the duration of preferences that take race into account, and (4) accord preferential status only to those groups as to which past discrimination has been adequately proven. Racial preferences that are not limited in these respects sweep more broadly than the evil sought to be cured, and go beyond remediation to impermissible racial discrimination.

III. The government's use of the Subcontracting Compensation Clause in this case cannot survive strict scrutiny. To cite only the most glaring constitutional deficiency, the government has established no evidentiary record of past discrimination in the relevant market, let alone made a finding specific to each distinct industry and each benefited minority group. Without more, this defect made the award of summary judgment in favor of the government improper.

ARGUMENT

I. THE PREFERENCE AT ISSUE HERE IS SUBJECT TO STRICT SCRUTINY AND MAY BE SUSTAINED ONLY IF NARROWLY TAILORED TO ACHIEVE A COMPELLING GOVERNMENTAL INTEREST

This Court has long held that "[c]lassifications based solely upon race must be scrutinized with particular care, since they are contrary to our traditions and hence constitutionally suspect." *Bolling* v. *Sharpe*, 347 U.S. 497, 499 (1954). *See Shaw* v. *Reno*, 113 S. Ct. 2816, 2824 (1993) ("Express racial classifications are immediately suspect"). The reason for searching review of governmental classifications based on race is evident and often stated. "Classifications of citizens solely on the basis of race 'are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.' They threaten to stigmatize individuals by reason of their membership in a racial group and to incite racial hostility." *Id.* (citations omitted) (quoting *Hirabayashi* v. *United States*, 320 U.S. 81, 100 (1943)). What is more, "[t]hey reinforce the belief, held by too many for too much of our history, that individuals should be judged by the color of their skin." *Shaw*, 113 S. Ct. at 2832.

This constitutional suspicion, however, has not resulted in automatic invalidation of all government actions that draw distinctions on the basis of race. Thus, for example, the Court has held that "race-conscious remedial action may be necessary" in order "to eliminate every vestige of racial segregation and discrimination in the schools." *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. 267, 277 (1986) (plurality opinion) (citing *North Carolina St. Bd. of Educ.* v. *Swann*, 402 U.S. 43, 46 (1971)). Similarly, "[w]here federal anti-discrimination laws have been violated, an equitable remedy may in the appropriate case include a racial or ethnic factor." *Fullilove* v. *Klutznick*, 448 U.S. 448, 483 (1980) (opinion of Burger, C.J.) (citing *Franks* v. *Bowman Transp. Co.*, 424 U.S. 747 (1976)).

The burden of this Court's decisions over the past sixteen years—at least since the decision and various opinions in *Regents of the University of California* v. *Bakke*, 438 U.S. 265 (1978)—has been to identify and articulate the appropriate basis for determining which racial preferences survive the constitutional suspicion that attaches to all such preferences and which do not.[2] The test for determining the validity of racial preferences adopted by state and local governments was definitively settled five years ago, when in *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469 (1989), a majority of the Court joined opinions holding that such preferences must be subject to the "strict scrutiny" test. *See id.* at 493 (opinion of O'Connor, J., joined by Rehnquist, C.J., and White and Kennedy, JJ.); *id.* at 520 (Scalia, J., concurring in the judgment) ("I agree * * * with Justice O'Connor's conclusion that strict scrutiny must be applied to all governmental classification by race"). The verbal formulation of this test, at least, is clear: Under strict scrutiny, a racial preference will pass constitutional muster only if it is "narrowly tailored" to achieve a "compelling governmental interest." *See, e.g., Shaw* v. *Reno*, 113 S. Ct. at 2825; *Wygant*, 476 U.S. at 277-278 (plurality opinion).

Croson also resolved (again, in the context of preferences by state and local governments) the question whether preferences which "operate[] against a group that historically has not been subject to governmental discrimination," *Wygant*, 476 U.S. at 273 (plurality opinion), are subject to a different standard of review than those that burden members of groups previously subject to discrimi-

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[2] *See Fullilove*, 448 U.S. at 516 (opinion of Powell, J.) ("Distinguishing the rights of all citizens to be free from racial classifications from the rights of some citizens to be made whole is a perplexing, but necessary, judicial task").

natory action by the government. The opinions of Justice O'Connor and Justice Scalia (which together were joined by a majority of the Court) both plainly rejected the application of a different standard for so-called "benign" racial preferences. *See Croson*, 488 U.S. at 494 (opinion of O'Connor, J.) ("the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification"); *id.* at 520 (Scalia, J., concurring in the judgment) (strict scrutiny applies "whether or not [the] asserted purpose is 'remedial' or 'benign' "). As Justice Powell had observed in his pivotal opinion in *Bakke*, "[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color." 438 U.S. at 289-290.

In considering the racial preference at issue in this case, however, the Tenth Circuit below refused to apply strict scrutiny. It held instead that a different standard was mandated because the "race-conscious program" at issue here was "implemented pursuant to a congressional command." 16 F.3d at 1543. Relying on its decision in *Ellis* v. *Skinner*, 961 F.2d 912 (10th Cir.), *cert. denied*, 113 S. Ct. 374 (1992), and this Court's decisions in *Fullilove* and *Metro Broadcasting, Inc.* v. *FCC*, 497 U.S. 547 (1990), the Tenth Circuit held that the racial preference should receive only "intermediate scrutiny," and be upheld if it served important governmental objectives within the power of Congress and was substantially related to achievement of those objectives. 16 F.3d at 1544.

For the reasons explained below, the Tenth Circuit erred in applying intermediate scrutiny to the racial preference at issue here. To be sure, the decision of this Court in *Metro Broadcasting* did apply what has come to be known as the "intermediate" level of constitutional scrutiny to what it labeled a "benign race-conscious measure[] mandated by Congress." 497 U.S. at 564. Significant differences in the context in which the respective racial preferences operate, however, undercut the basis identified in *Metro Broadcasting* for departure from the usual rule that racial preferences are subject to the most searching inquiry. This Court should reject the approach of the Tenth Circuit and subject the preference at issue here to strict scrutiny.

The Federal Government, no less than the States, is bound to provide all citizens equal protection of the laws. Although there is no express Equal Protection Clause applicable to the actions of the Federal Government, this Court has held since at least the decision in *Bolling* (the companion to *Brown* v. *Board of Education*, 347 U.S. 483 (1954)), that "[i]t would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government" than it imposes on the States. 347 U.S. at 500. Thus, the Court was able to explain in 1975 that its "approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment." *Weinberger* v. *Weisenfeld*, 420 U.S. 636, 638 n.2 (1975).[3] Even when the Court admitted the possibility that the protections afforded by the Fifth and Fourteenth Amendments may "not always [be] coextensive," it recognized that "both amendments require the same type of analysis." *Hampton* v. *Mow Sun Wong*, 426 U.S. 88, 100 (1976).

For many years, it was generally understood that strict scrutiny was the "type of analysis" to which all racial preferences—including those adopted by the Federal Gov-

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[3] *See also United States* v. *Paradise*, 480 U.S. 149, 166 n.16 (1987) (opinion of Brennan, J.) (the "reach of the equal protection guarantee of the Fifth Amendment is coextensive with that of the Fourteenth"); *id.* at 196 (O'Connor, J., dissenting, joined by Rehnquist, C.J., and Scalia, J.); *Buckley* v. *Valeo*, 424 U.S. 1, 93 (1976) ("Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment"); *Johnson* v. *Robison*, 415 U.S. 361, 364-365 n.4 (1974).

ernment—were subject. Indeed, the Court first articulated the test now known as strict scrutiny 50 years ago in cases considering the validity of actions of the Federal Government. *See, e.g., Korematsu* v. *United States*, 323 U.S. 214, 216 (1944) ("all legal restrictions which curtail the civil rights of a single racial group are immediately suspect * * * courts must subject them to the most rigid scrutiny").

Nevertheless, beginning with this Court's decision in *Fullilove*, the Court began to consider the effect on the standard of review of the positive grant of authority to Congress in Section 5 of the Fourteenth Amendment to "enforce, by appropriate legislation," the substantive provisions of that Amendment. At issue in *Fullilove* was the constitutionality of a ten percent minority set-aside established by an Act of Congress. Although the Court upheld the set-aside, the various opinions of the Court did not definitively resolve the question of what standard should be applied to congressional actions adopted as a remedy for past discrimination.

As Justice O'Connor would later observe in *Croson*, "[t]he principal opinion in *Fullilove*, written by Chief Justice Burger, did not employ 'strict scrutiny' or any other traditional standard of equal protection review." 488 U.S. at 487. Rather, the opinion (joined by Justices White and Powell) avoided the application of any particular level of scrutiny in favor of a "careful judicial examination" to assure that the congressional enactment was "narrowly tailored" to accomplish the plainly constitutional "objective of remedying the present effects of past discrimination." *Fullilove*, 448 U.S. at 480. *See id.* at 491 ("Any preference based on racial or ethnic criteria must necessarily receive a most searching examination"). Justice Powell's understanding of the opinion that he joined was explained in his separate opinion; he clearly believed that strict scrutiny should be applied to the

racial preference at issue. *See id.* at 496.[4] The third opinion supporting the judgment, written by Justice Marshall and joined by Justices Brennan and Blackmun, upheld the set-aside under intermediate scrutiny, *id.* at 519, while the dissent of Justice Stewart, joined by then-Justice Rehnquist, would have applied strict scrutiny to invalidate the program, *id.* at 523, and Justice Stevens' separate dissent asserted that "[r]acial classifications are simply too pernicious to permit any but the most exact connection between justification and classification." *Id.* at 537. *Fullilove*, therefore, plainly did not resolve the question of what standard should be applied to racial preferences enacted by Congress.

The Court next considered the issue in *Croson*. Justice O'Connor's plurality opinion, joined in this respect by the Chief Justice and Justice White, discussed the decision in *Fullilove* in response to the argument that it excused the City of Richmond from the obligation to make specific findings of past discrimination to support race-conscious action. *See* 488 U.S. at 486-493. What this argument ignored, Justice O'Connor explained, "is that Congress, unlike any State or political subdivision, has a specific constitutional mandate to enforce the dictates of the Fourteenth Amendment." *Id.* at 490. Thus, "our treatment of an exercise of congressional power in *Fullilove* cannot be dispositive here." *Id.* at 491. Because it did not involve congressional action, however, *Croson* did not speak to the question of what standard should be applied to such action. Instead, it simply recognized what the Fourteenth Amendment makes plain by terms: that Congress was granted special powers—not similarly granted to the States—to enforce the guarantee of equal protection.

Congressionally-authorized racial preferences were next before the Court in *Metro Broadcasting*. Together with

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[4] *See also Wygant*, 476 U.S. at 273-274 (opinion of Powell, J.) (describing test articulated in Chief Justice Burger's opinion in *Fullilove* in terms of strict scrutiny).

its companion case, *Metro Broadcasting* considered the validity under equal protection principles of two minority preference policies adopted by the Federal Communications Commission. Under these policies, the Commission awarded "preference to minority owners in comparative license proceedings," 497 U.S. at 558, and permitted certain licenses to be transferred only to minority-controlled firms. The Commission adopted these policies as part of its effort to ensure "[a]dequate representation of minority viewpoints in programming," which it believed "serves not only the needs and interests of the minority community but also enriches and educates the non-minority audience" and "enhances the diversified programming which is a key objective not only of the Communications Act of 1934 but also of the First Amendment." *Id.* at 556 (quoting *Statement of Policy on Minority Ownership of Broadcasting Facilities,* 68 F.C.C.2d 979, 980-981 (1978)).

The Court upheld the FCC's policies. First considering the standard of review, Justice Brennan's opinion for the Court noted that "[i]t is of overriding significance in these cases that the FCC's minority ownership programs have been specifically approved—indeed, mandated—by Congress." 497 U.S. at 563. Citing the various opinions in *Fullilove,* the opinion announced that it would apply to the FCC's policies—which it considered "benign race-conscious measures mandated by Congress"—the standard of intermediate scrutiny articulated by the three members of the *Fullilove* Court who joined in Justice Marshall's concurrence. *Id.* at 564-565.

Although *Metro Broadcasting* plainly involved "race-conscious measures mandated by Congress," the Court did not expressly discuss what, in its view, made those race-conscious measures "benign" and thus justified intermediate scrutiny. The Court did not rely simply on the fact that the policy benefited those who belong to groups that had been the victims of either specific or more general societal discrimination. As the Court noted, "Congress

and the Commission do not justify the minority ownership policies strictly as remedies for victims of discrimination." *Id.* at 566. Rather, "Congress and the FCC have selected the minority ownership policies primarily to promote program diversity." *Id.* It was that interest, the Court explained at length, that justified the racially-conscious policies that had been adopted by the FCC.

The interest in "broadcast diversity," the Court noted, could be compared to other interests where the racial identity of the party could legitimately be considered in administering government programs. "Just as a 'diverse student body' contributing to a '"robust exchange of ideas"' is a 'constitutionally permissible goal' on which a race-conscious university admissions program may be predicated, * * * the diversity of views and information on the airwaves serves important First Amendment values." *Id.* at 568 (quoting *Bakke,* 438 U.S. at 311-313 (opinion of Powell, J.)). The Court observed that the "benefits of such diversity are not limited to the members of minority groups who gain access to the broadcasting industry by virtue of the ownership policies; rather, the benefits redound to all members of the listening and viewing audience." 497 U.S. at 568. As Justice Stevens explained in his separate concurrence, the case fell "within the extremely narrow category of governmental decisions for which racial or ethnic heritage may provide a rational basis for differential treatment. The public interest in broadcast diversity—like the interest in an integrated police force, diversity in the composition of a public school faculty, or diversity in the student body of a professional school—is in my view unquestionably legitimate." *Id.* at 601-602 (footnotes omitted).

The racial preferences considered in *Metro Broadcasting,* therefore, were justified not because they promoted a particular racial or ethnic mix of broadcast station ownership as an end in itself, but because of the belief that diverse ownership would advance a distinct societal in-

terest—diversity of viewpoint on the broadcast spectrum—that would be unmet in the absence of racially-conscious policies. As Justice Stevens recognized, the decision thus turned on the crucial role of the broader community interests served by race-conscious policies. Society, not just the minorities who gain employment, benefits from policies promoting racially-diverse faculties in its institutions of higher learning. Similarly, society reaps ongoing benefits from encouraging diverse ownership of broadcast facilities, for, the Court found in *Metro Broadcasting*, "as more minorities gain ownership and policymaking roles in media, varying perspectives will be more fairly represented on the airwaves." *Id.* at 582.

The policy at issue here, however, while perhaps advancing the economic interests of minority contractors, advances no additional distinct societal interest that would be unmet in the absence of racial preferences. Unlike the students who benefit from attending a school with a racially-diverse faculty, or the consumers of broadcast services who are exposed to a diversity of viewpoints, drivers along the completed highway care not about—indeed, will be unaware of—the racial identity of the contractor who built the guardrails. The assumption indulged by this Court in *Metro Broadcasting* was that the racial identity of the owner of a broadcast station would affect the nature of the broadcast product. *See id.* at 569-584. No similar assumption is plausible in this case, nor has the government suggested that the racial identity of a guardrail contractor will have any effect on the guardrail the contractor constructs. The racial preference at issue in this case, therefore, is accompanied by none of the indicia of "benignity" that the Court emphasized in *Metro Broadcasting*.

It is not enough to contend that society as a whole is benefited by a construction industry with a particular racial or ethnic mix of owners. However desirable such an outcome may be, "[p]referring members of any one

group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids." *Bakke*, 438 U.S. at 307 (opinion of Powell, J.). Such preferences should not be labeled benign, and subject under *Metro Broadcasting* to intermediate scrutiny, in the absence of a societal benefit from the racial preference apart and distinct from the benefit bestowed on the favored class. That definition of a "benign" benefit would reflect "only acceptance of the current generation's conclusion that a politically acceptable burden, imposed on particular citizens on the basis of race, is reasonable." *Metro Broadcasting*, 497 U.S. at 610 (O'Connor, J., dissenting).

Rather, in the absence of the sort of rationale that supported *Metro Broadcasting*—present only in an "extremely narrow category of cases," *Metro Broadcasting*, 497 U.S. at 601 (Stevens, J., concurring)—the Court should continue to subject federal racial preferences, like those of state and local governments, to strict scrutiny. Otherwise, the judgments of this Court and other courts on this most perplexing issue will be reduced to little more than a labeling exercise: if a judge can affix the label "benign" to congressional preferences deemed worthwhile, those preferences will then be subject to only intermediate scrutiny.[5]

But the extreme danger to society from the use of racial preferences demands that review of such preferences be more than a formality. As Justice O'Connor has explained: "Absent searching judicial inquiry into the justification for such race-based measures, there is simply no

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[5] It is worth noting that those Justices who have applied intermediate scrutiny to racial preferences have almost-universally found the preferences to be constitutional. *See, e.g., Metro Broadcasting, supra; Croson*, 488 U.S. at 528 (Marshall, J., dissenting); *Wygant*, 476 U.S. at 301-302 (Marshall, J., dissenting); *Bakke*, 438 U.S. at 324 (joint opinion of Brennan, White, Marshall, and Blackmun, JJ.).

way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simply racial politics." *Croson*, 488 U.S. at 493 (O'Connor, J., joined by Rehnquist, C.J., and White and Kennedy, JJ.). That "searching judicial inquiry" is called strict scrutiny, and "one of the purposes of strict scrutiny is to 'smoke out' illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool." *Id.* This Court should insist upon proof that the racial preferences at issue here are narrowly tailored to serve compelling governmental interests.

II. THE RACIAL PREFERENCE FOR MINORITY CONSTRUCTION SUBCONTRACTORS SURVIVES STRICT SCRUTINY ONLY IF BASED ON CREDIBLE EVIDENCE OF DISCRIMINATION AGAINST THE PREFERRED CLASS OF FIRMS AND NARROWLY TAILORED TO REMEDY THAT DISCRIMINATION

This Court's cases establish that racial favoritism in the award of government construction contracts can survive strict scrutiny only if based on credible evidence of a compelling interest in providing a remedy for identified past discrimination. *See Croson*, 488 U.S. at 491-492; *Fullilove*, 448 U.S. at 480-484. It is plainly not enough for the legislative or executive branches of government simply to declare that a racial preference is remedial. *See Croson*, 488 U.S. at 500; *O'Donnell Constr. Co.* v. *District of Columbia*, 963 F.2d 420, 425 (D.C. Cir. 1992) ("undocumented legislative declarations of remedial purposes count for naught"). Rather, an evidentiary record justifying the particular racial preference at issue is necessary. In the absence of such a record, the judiciary cannot fulfill its obligation to undertake an independent and meaningful review of the need for the preference, or assess whether it has been narrowly tailored to serve its remedial purpose.

"Evidentiary support for the conclusion that remedial action is warranted [is] crucial," because "the trial court must make a factual determination" that the government entity "had a strong basis in evidence for its conclusion that remedial action was necessary." *Wygant*, 476 U.S. at 277 (plurality opinion). For "unless such a determination is made, an appellate court reviewing a challenge * * * to remedial action cannot determine whether the race-based action is justified as a remedy for prior discrimination." *Id.* at 278. *See Croson*, 488 U.S. at 510 ("Proper findings in this regard are necessary to define both the scope of the injury and the extent of the remedy necessary to cure its effects."); *see also Fullilove*, 448 U.S. at 498 (Powell, J., concurring) ("the governmental body must make findings that demonstrate the existence of illegal discrimination"). *Cf. Turner Broadcasting System, Inc.* v. *FCC*, 114 S. Ct. 2445, 2470 (1994) ("When the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply 'posit the existence of the disease sought to be cured.' ") (citation omitted).

A. The Record Evidence Must Demonstrate Discrimination Against The Preferred Class Of Firms

In *Croson*, this Court expressly rejected the City of Richmond's claim that it could infer discrimination in the award of city construction contracts from a disparity between the percentage of prime contracts awarded to minority enterprises and the percentage of minorities comprising the population of Richmond. *See* 488 U.S. at 501. At the same time, however, *Croson* stated in dictum that a prima facie case of discrimination might be based upon better statistical proof. *Id.* at 501, 509. In the several years since *Croson*, a number of States and localities have attempted to demonstrate a compelling interest in implementing racial preferences in their construction contracting by documenting disparities between the percentage of government contract dollars going to minority-owned construction contractors and the percentage of such businesses

among all construction contractors in a particular area.[6] *See, e.g., Concrete Works of Colorado, Inc.* v. *Denver*, No. 93-1095 (10th Cir. Sept. 23, 1994), Slip Op. at 26-38; *Contractors Ass'n of Eastern Pennsylvania, Inc.* v. *City of Philadelphia*, 6 F.3d 990, 1003-08 (3d Cir. 1993); *Associated General Contractors, Inc.* v. *Coalition for Economic Equality*, 950 F.2d 1401, 1414-15 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 1670 (1992); *Cone Corp.* v. *Hillsborough County*, 908 F.2d 908, 914-916 (11th Cir.), *cert. denied*, 498 U.S. 983 (1990).[7] All too often, however, the statistical evidence currently being offered in support of racial preferences contains serious methodological and conceptual flaws.[8]

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[6] Such efforts are designed to generate what is known as a "disparity ratio." "A disparity ratio is usually defined as utilization of the minority group divided by the percentage of firms owned by the minority group. If 10% of the construction firms in a geographic region are owned by minorities and they receive 10% of the construction business, the disparity ratio would equal 1, indicating no disparity. If the ratio is less than 1 there is evidence of disparity." John Lunn, *Markets, Discrimination, and Affirmative Action*, in Racial Preferences in Government Contracting 58 (Roger Clegg ed. 1993).

[7] Courts properly have recognized that the use of some valid statistical evidence is necessary to prove the kind of discrimination that would justify the adoption of a race-based contracting scheme. "While anecdotal evidence may suffice to prove individual claims of discrimination, rarely, if ever, can such evidence show a systemic pattern of discrimination necessary for the adoption of an affirmative action plan." *Coral Constr. Co.* v. *King County*, 941 F.2d 910, 919 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 875 (1992). *Accord Concrete Works*, Slip Op. at 14; *Contractors Ass'n*, 6 F.3d at 1003; *O'Donnell Constr. Co.*, 963 F.2d at 427. Accordingly, a racial contracting preference "cannot stand without a proper statistical foundation." *Coral Constr. Co.*, 941 F.2d at 919.

[8] For an explanation of the shortcomings of the studies conducted in Milwaukee, Denver, Dade County, Baltimore, and San Francisco, *see* George R. LaNoue & John Sullivan, *"But For" Discrimination: How Many Minority Businesses Would There Be?*, 24 Colum. Hum. Rts. L. Rev. 93, 102-126 (1992); George R. LaNoue, *The Disparity Study Shield: Baltimore and San Francisco*, in Racial Preferences in Government Contracting, *supra*, at 74-76.

In our view, a statistical disparity can be invoked to justify racial preferences in government construction contracting only if it actually supports an inference of racial discrimination against the preferred class of firms. At a minimum, the statistical evidence must: (1) relate to a defined and relevant market; (2) compare comparably qualified and available minority and non-minority firms within that market; (3) control for such race-neutral, market-relevant variables as firm size and experience; (4) calculate the disparity ratio for each minority group granted preferential treatment; and (5) identify, alone or in conjunction with anecdotal evidence, the discriminatory practices at fault in the relevant market. These requirements are in keeping with *Croson*'s admonition that, before government can act to remedy past discrimination, it must "identif[y] that discrimination with the particularity" required by the Constitution. 488 U.S. at 492.

To begin with, the statistical evidence must relate to an identified and relevant market. A disparity ratio based, for example, on the value of contracts that a city has awarded to minority firms based within the city might well exaggerate the likelihood of discrimination, because the data would exclude all contracts awarded to minority firms based outside the city. The geographical boundaries of a particular market are not necessarily identical to the jurisdictional boundaries of a particular government. *See Coral Constr. Co.*, 941 F.2d at 917 ("The world of contracting does not conform itself neatly to jurisdictional boundaries."); *Concrete Works*, Slip Op. at 13, 14 (recognizing that the relevant local market "is not necessarily confined by jurisdictional boundaries" because "contracts are often awarded to firms situated in adjacent areas").

The size and contours of a particular market will, of course, vary with the nature and value of the work to be done. Very large projects, exceeding $100 million, will attract bidders from all parts of the country, and from

other countries. Very small projects, under $100,000, may not attract bidders more than 50 miles away.

The relevant market also depends on the nature of the work involved. Statistical data on the "construction industry" or "government contracting" paints with too broad a brush. Rather, courts should insist that the government identify and separately examine the distinct segments of the construction industry to which the government would apply racial preferences. There are vast differences between the many different activities—from painting, to plumbing, to highway or bridge construction—that collectively make up the "construction industry." There are equal if not greater differences between prime or general contracting and construction subcontracting. These and many other distinct categories of construction activity vary greatly with respect to the knowledge, skills, and abilities required to perform the work; the equipment, financing, insurance, and bonding required; and—as the census data reproduced in the appendix to this brief confirm (App. 1a-3a, *infra*)—the number and size of the firms; the average value of a project; and the relative amount of revenues derived from private contracts, federal contracts, and state contracts.

Because of these differences, the existence of discrimination within each construction market, and the extent to which discrimination can be demonstrated with statistical evidence, will vary. *See* App. 4a-5a, *infra* (widely varying percentages of minority firms in different categories of construction activity). This fact makes it inappropriate for the government to impose an industry-wide preference scheme on the basis of evidence of discrimination in the construction industry generally. That there is statistical evidence of discrimination in the construction industry generally provides no guidance as to whether there is discrimination against, say, electrical subcontractors. To lump all construction firms together for analytical purposes can no more prove discrimination in

a particular market than would a comparison of one market to another. *Cf. Wards Cove Packing Co.* v. *Atonio*, 490 U.S. 641, 650-651 (1989). Accordingly, disparity analyses must be performed for each truly distinct category of construction activity. Just as the government cannot enact a racial preference because of open-ended notions of "societal discrimination," *see Wygant*, 476 U.S. at 274-276; *Bakke*, 438 U.S. at 307-310 (opinion of Powell, J.), it cannot impose racial classifications upon all of the distinct segments of the "construction industry" on the basis of aggregate data that may well obscure more than it reveals.

Second, having identified a proper market, a disparity analysis cannot simply compare the percentage of the total dollar volume of work performed by minority firms in the market with the percentage of minority firms in that market. Rather, the analysis must consider only those firms—minority and non-minority—similarly qualified and available to perform the contracts at issue. *See Croson*, 488 U.S. at 509 (the relevant pool is "the number of qualified minority contractors willing and able to perform a particular service"). It is well-established that statistics purporting to show employment discrimination must consider only those individuals qualified and available for work. *See, e.g., Wards Cove Packing Co.*, 490 U.S. at 650-651; *Johnson* v. *Transportation Agency*, 480 U.S. 616, 632 (1987); *Hazelwood Sch. Dist.* v. *United States*, 433 U.S. 299, 308 & n.13 (1977). In *Contractors Ass'n, supra*, Philadelphia proffered evidence that minority firms constituted 6.4 percent of all businesses licensed to operate in the city but received only .09 percent of the city's contract dollars over a three-year period. The Third Circuit rightly held that "[t]hese statistics do not satisfy *Croson* because they do not indicate what proportion of the 6.4 percent of minority-owned businesses were available or qualified to perform City construction contracts." 6 F.3d at 1003.

Third, the evidence must account for race-neutral, market-related factors such as the size and experience of different firms. Larger, more experienced firms naturally will tend to receive more contract dollars than smaller, newer firms. Smaller firms cannot bid on the largest projects. New firms face uphill competition against firms with established reputations. *See, e.g.*, John Lunn, *Markets, Discrimination, and Affirmative Action*, in Racial Preferences in Government Contracting, *supra*, at 57-58. Yet minority firms tend to be smaller and newer. *See* George R. LaNoue, *The Disparity Study Shield*, in Racial Preferences in Government Contracting, *supra*, at 109; George R. LaNoue & John Sullivan, "*But For*" *Discrimination, supra*, at 113-114. A study that does not account for variations in size and experience can easily suggest discrimination on the basis of race when in fact it does not exist. *See Concrete Works*, Slip Op. at 34 & n.22; *O'Donnell Constr. Co.*, 963 F.2d at 426-427.

Fourth, disparity ratios should be calculated for each minority group to which preferential treatment is accorded. That there is statistically significant evidence of discrimination against several minority groups taken collectively says nothing about the extent of the discrimination faced by each group individually. Under *Croson*, only those groups as to which there is proof of discrimination can be given a preference in contracting. *See* 488 U.S. at 506. *See also Contractors Ass'n*, 6 F.3d at 1007 ("Consistent with strict scrutiny, we must examine the data for each minority group contained in the Ordinance.").

Fifth, the government's evidence must identify the specific industry practices that are discriminatory. Discrimination in government contracting can potentially occur at a number of distinct points of interaction: between the government and the architect or engineer; between the government and the prime contractor; between the prime contractor and the subcontractor; and between either the prime or subcontractor and the bonding companies, bankers, insurers, suppliers, and often the unions with whom they must deal. Evidence that fails to identify where, how, and by whom the discrimination occurs cannot lend itself to the crafting of a narrowly tailored remedy.

The law of employment discrimination is instructive in this regard. It is insufficient for a plaintiff in a Title VII case to prove statistical disparity in the employer's work force. Rather, the plaintiff "must begin by identifying the specific employment practice that is challenged." *Watson* v. *Fort Worth Bank & Trust*, 487 U.S. 977, 994 (1988). *See also Wards Cove Packing Co.*, 490 U.S. at 656-657 ("Our disparate-impact cases have always focused on the impact of *particular* hiring practices on employment opportunities for minorities. * * * [A] Title VII plaintiff does not make out a case of disparate impact simply by showing that, 'at the bottom line,' there is a racial *imbalance* in the work force.") (emphases in original). The rule in a case involving an equal protection challenge to a race-based contracting preference should be no different, for prime contract set-asides and subcontracting requirements are not appropriate remedies for discrimination in financial, insurance, or bonding markets.

In sum, the government's evidence must be probative of discrimination, and not merely consistent with the hypothesis or assumption that discrimination has occurred. "Disparity" is not synonymous with "discrimination." The statistical evidence proferred in *Croson* was rejected because that evidence neither affirmed nor refuted the existence of discrimination in Richmond's construction contracting. The same will be true of any evidence that does not identify and relate to the relevant market, or make appropriate comparisons that control for legitimate nonracial factors, such as expertise, interest, size, and experience. Nor does it satisfy strict scrutiny to affirm the existence of discrimination but fail to identify the source of that discrimination with sufficient precision to craft a narrowly tailored remedy.

B. The Racial Preference Must Be Narrowly Tailored To Remedy The Identified Discrimination

The second prong of the strict scrutiny test requires that a race-based classification be narrowly tailored to the achievement of its remedial objective. The purpose of this judicial inquiry is to ensure that the classification sweep no more broadly than necessary in light of the particular reasons justifying its adoption.

First, the government must consider race-neutral alternatives before adopting a race-conscious scheme. *See Croson,* 488 U.S. at 507; *United States* v. *Paradise,* 480 U.S. at 171. *See also Metro Broadcasting,* 497 U.S. at 584 (minority ownership preferences adopted "only after long study and painstaking consideration of all available alternatives"). In this context, such alternatives could include educational and capital assistance to all small and new construction firms, disaggregation of large contracts to expand opportunities for such firms, scrutiny of bonding or insurance requirements to guarantee that there are no unnecessary hurdles disproportionately hindering such firms, or contracting out more projects that could suitably be performed by such firms. Any plan that has as its avowed primary goal the advancement of small or disadvantaged businesses—and not just minority firms—ought to bear a heavy burden of showing that such enterprises could not be aided without the use of race-conscious schemes, as minority firms have no monopoly on small or disadvantaged status.

Second, any quota or "goal" for minority participation in a particular market must be related to the aggregate capacity of qualified and interested minorities in the relevant market. *See Paradise,* 480 U.S. at 179. Such objectives cannot be premised on the "completely unrealistic assumption that minorities will choose a particular trade in lockstep proportion to their representation in the local population." *Croson,* 488 U.S. at 507, citing *Sheet Metal Workers* v. *EEOC,* 478 U.S. 421, 494 (1986) (O'Connor, J., concurring in part and dissenting in part). Furthermore, plans setting quotas or goals should contain waiver provisions in case the numerical objectives are impracticable in a particular place or time, and cannot be achieved despite good faith efforts. *See Fullilove,* 448 U.S. at 481-482.

Third, a racial preference in government construction contracting ought to be limited in duration, as would be appropriate of any measure justified as a *remedy* for an identified problem. *See Fullilove,* 448 U.S. at 510-511 (Powell, J., concurring). The fact that the federal program at issue in *Fullilove* was a temporary measure was essential to its constitutionality. *See id.* at 513 (opinion of Burger, C.J.) ("The * * * set aside is not a permanent part of federal contracting requirements."). *Cf. Croson,* 488 U.S. at 478 (five-year plan). Of course, a legislative body cannot simply adopt an endless succession of "temporary" programs. *See O'Donnell Constr. Co.,* 963 F.2d at 428 ("Although the District's original legislation was to expire in three years * * * the Council reenacted the law in 1980 and deleted the sunset provision. Fifteen years have passed since the District put its minority contracting program into effect. The District has not suggested that an end is in sight.").[9]

Fourth, the plan may accord preferential treatment only to those groups as to which discrimination has been adequately proven. *See Croson,* 488 U.S. at 506 ("The random inclusion of racial groups that, as a practical matter, may never have suffered from discrimination in

[9] At some point, every racial preference in government construction contracting changes the statistical outcome of the contracting process. At that point, it may be difficult to know whether the preference has remedied discrimination or is simply masking it. After sufficient experience under a preference regime, the government may be unable to carry its burden of demonstrating a compelling interest in continuation of the program. *See, e.g., Associated General Contractors of Connecticut* v. *City of New Haven,* 791 F. Supp. 941 (D. Conn. 1992).

the construction industry in Richmond suggests that perhaps the city's purpose was not in fact to remedy past discrimination."); *Wygant,* 476 U.S. at 284 n.13. The government must be able to explain why the groups included within a racial scheme were so chosen.

III. THE FEDERAL GOVERNMENT'S USE OF THE SUBCONTRACTING COMPENSATION CLAUSE DOES NOT SURVIVE STRICT SCRUTINY

The Central Federal Lands Highway Division (CFLHD) —a subagency organized under the Department of Transportation with jurisdiction over 13 western States—includes Subcontracting Compensation Clauses (SCCs) within its prime contracts to induce prime contractors to award subcontracts to minority-owned firms. Under the SCC program, prime contractors are eligible for a financial bonus of up to 2 percent of the total amount of the prime contract for subcontracting at least 10 percent of the required work to minority firms.[10]

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[10] The government repeatedly argues that the provisions of the SCC are "not race-based, but turn on disadvantage." Gov't Br. in Opp. to Cert. 16; *see also id.* at 5-6, 11-12, 18-19. This argument is disingenuous in the extreme. Minority firms are legally "presumed" to be disadvantaged under the SCC program. A race-based presumption of this sort, no less than an explicit racial set-aside, triggers the need for strict scrutiny under the Constitution:

> [Wisconsin] argues that *Croson* does not govern here because the discrimination is not racial in character, the favored class being defined not as minority business enterprises but as disadvantaged business enterprises. * * * All this is fine but ignores the fact that the state *presumes* a black, but not an Appalachian or any other sort of white male, to be disadvantaged. The presumption is, it is true, rebuttable. But it seems to us * * * that a racial presumption is a form of race discrimination, as would be obvious if the state had a rebuttable presumption that black subcontractors ought not to be permitted to work on state highway projects. [*Milwaukee County Pavers Ass'n* v. *Fiedler*, 922 F.2d 419, 421 (7th Cir.) (emphasis in original), *cert. denied*, 500 U.S. 954 (1991).]

The racial contracting preference at issue in this case cannot survive strict scrutiny. To begin with the most glaring constitutional defect of the SCC program: the federal government has made no specific finding of past discrimination in the federal contracting process in the relevant market in which the SCC program is used, much less a finding specific to each minority group. The government instead relies upon the general findings made by Congress in connection with the Small Business Act. *See* Gov't Br. in Opp. to Cert. 15 (citing 15 U.S.C. 631(f)). Central among those findings was Congress' conclusion that some "persons are socially disadvantaged because of their identification as members of certain groups that have suffered the effects of discriminatory practices or similar invidious circumstances over which they have no control." 15 U.S.C. 631(f)(1)(B). Yet this is just the sort of "generalized assertion that there has been past discrimination" that *Croson* roundly condemns. 488 U.S. at 498; *see also id.* at 500 (conclusory statements that discrimination exists "are of little probative value in establishing identified discrimination" in a particular area and industry). Furthermore, this finding, to the extent that it is probative, predicates the need for action upon general *societal* discrimination. Yet "[s]ocietal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy." *Wygant*, 476 U.S. at 276; *see also Bakke*, 438 U.S. at 307 (opinion of Powell, J.).

Nor is the scope of the racial preference at issue here tied to any legitimate remedial goal. The SCC program is designed to encourage prime contractors to award at least 10 percent of their subcontracting work to minority firms. The 10 percent figure, however, is not linked to identified discrimination in any discernible way. Rather, the apparent basis for that figure is the SBA's mandate that minority-owned firms be given the "maximum practicable opportunity," 15 U.S.C. 644(g)(1), to participate in federal procurement. The goal of maximizing the participation of minorities in contracting cannot, however,

justify a racial classification for it has "no logical stopping point" and would permit racial favoritism "long past the point required by any legitimate remedial purpose." *Wygant*, 476 U.S. at 275. The government's failure to link the SCC program to identified discrimination therefore belies any claim that the program is strictly remedial.

Accordingly, because there is no strong basis in evidence for the conclusion that the SCC program is necessary to remedy identified past discrimination, it was clearly inappropriate for the courts below to award summary judgment to the government.

CONCLUSION

For the foregoing reasons, and those in petitioner's briefs, the judgment below should be reversed.

Respectfully submitted,

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APPENDIX

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TABLE A

CONSTRUCTION INDUSTRY CHARACTERISTICS— GENERAL CONSTRUCTION

SIC * CODE	Percentage of revenue from Private sources	Percentage of revenue from Federal sources	Percentage of revenue from State/ Local	Value of construction (billions)	Number of establishments	Average value of construction per est. (1000s)
1521 SingFam Houses	97	1	2	39.1	90,378	333
1522 Other residences	88	5	8	13.3	8,143	1879
1531 Operat. Builder	99	.1	.9	49.0	20,766	2360
1541 Warehouses	84	7	9	21.4	7,014	3051
1542 Misc. Contractor	79	6	15	89.8	31,337	2866
Total	—	—	—	212.6	157,648	1349

Source: 1987 Census of Construction Industries, CC87-I, Table 2. All columns rounded except number of establishments.

* Standard Industrial Classification.

TABLE B

CONSTRUCTION INDUSTRY CHARACTERISTICS— HEAVY CONSTRUCTION

SIC * CODE	Percentage of revenue from Private sources	Percentage of revenue from Federal sources	Percentage of revenue from State/ Local	Value of construction (billions)	Number of establishments	Average value of construction per est. (1000s)
1611 Highway/ Street	30	14	57	34.2	10,986	3113
1622 Bridge/ Tunnel	13	20	67	5.5	1,159	4745
1623 Water & Sewer	63	6	31	17.0	9,919	1714
1629 Other heavy constr.	65	11	24	25.6	14,532	1762
Total	—	—	—	82.3	35,596	2312

Source: 1987 Census of Construction Industries, CC87-I, Table 2. All columns rounded except number of establishments.

* Standard Industrial Classification.

TABLE C

CONSTRUCTION INDUSTRY CHARACTERISTICS-- SPECIAL TRADES

SIC * CODE	Percentage of revenue from Private sources	Percentage of revenue from Federal sources	Percentage of revenue from State/ Local	Value of construction (billions)	Number of establishments	Average value of construction per est. (1000s)
1711 Plumber	86	5	10	49.5	69,566	712
1721 Painter	85	5	10	8.0	29,867	466
1731 Electr.	83	6	12	35.8	49,436	724
1741 Masonry	86	3	10	8.7	23,284	374
1751 Carpenter	95	2	4	11.2	36,009	311
1761 Roofer	85	5	11	15.0	25,673	582
1771 Concrt.	85	3	12	15.0	23,422	640
1791 Str. Steel	77	6	17	4.8	4,017	1194
Total	—	—	—	148.0	261,274	566

Source: 1987 Census of Construction Industries, CC87-I, Table 2. All columns rounded except number of establishments.

* Standard Industrial Classification.

TABLE D

NATIONAL PROPORTIONS OF MINORITY FIRMS
BY CONSTRUCTION INDUSTRY CATEGORY

	Women *	Blacks *	Hispan-ics *	Asians, Nat. Am.*	Non-M/WBEs	M/WBEs %
SIC ** 1611 Hgw./St	494	133	116	25	8403	8.4
SIC 1600s (Except 1611) Heavy constr.	1013	142	202	53	20729	6.4
SIC 171 Plumbing, heating, air con.	3850	711	1229	354	63678	8.8
SIC 172 Paint., walpr., Decorat-ing	3249	976	1911	480	22821	22.5
SIC 173 Elec-trical	2831	533	733	325	46130	8.7
SIC 174 Masonry stone-work, plaster	2272	2194	2125	386	36662	16.0
SIC 175 Carpen-ter, flooring	3172	1241	2149	550	34903	17.0
SIC 176 Roofing	1374	354	714	260	20730	11.5
SIC 177 Concrt.	1111	1290	1067	61	18112	12.4
SIC 1791 Struc. Steel	169	12	27	10	3248	6.3

	Women *	Blacks *	Hispan-ics *	Asians, Nat. Am.*	Non-M/WBEs	M/WBEs %
SIC 1794 Excav./ Founda-tion	759	61	78	19	15912	5.4
SIC 1795 Wreck-ing, demo.	30	16	6	0	708	1.3
SIC 1799 Special Trade	1321	169	293	67	25007	6.9
Total	21645	7832	20254	2590	317043	11.6

Source: For M/WBEs—Special tabulation by the Bureau of the Census (1987); for non-M/WBEs, County Business Patterns, United States Summary (1987).

* Double counts businesses owned by female minorities.

** Standard Industrial Classification.

(1)

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No. 93-1841

IN THE
Supreme Court Of The United States
October Term, 1994

ADARAND CONSTRUCTORS, INC.,
Petitioner,

v.

FEDERICO PENA, Secretary of Department of Transportation; THOMAS D. LARSEN, Administrator of the Federal Highway Administration; LOUIS N. MACDONALD, Administrator Region VIII of the Federal Highway Administration; and JERRY BUDWIG, Division Engineer of the Central Federal Lands Highway Division,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF *AMICUS CURIAE* OF ATLANTIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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BRIEF *AMICUS CURIAE* OF ATLANTIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE**

Atlantic Legal Foundation, Inc. ("ALF") is a not-for-profit public interest law firm incorporated in Pennsylvania whose purpose is to present a balanced articulation of public interest in cases that involve issues of law that are likely to have broad impact beyond the interests of the particular litigants, or that have public policy implications or are significant for the development of principles of constitutional law. ALF has appeared before this Court, several federal courts of appeal and district courts as counsel for parties or intervenors, or as *amicus* and before the highest courts of several states in numerous cases involving issues of public policy or constitutional law, including cases focusing on discrimination and affirmative action policies of the federal government, states and localities.

The issue in this case is of great significance in the development of rational and consistent principles of law in the area of affirmative action.

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* Pursuant to Rule 36 of the Rules of the Court, letters from counsel of record for the parties, evidencing their consent to the filing of this brief are being filed under separate cover simultaneously with the filing of this brief.

SUMMARY OF ARGUMENT

The federal procurement program at issue in this case is both *de jure* and *de facto* racially based. Indeed, the Small Business Administration's application of the statutory standard is not only based on race, it is based on skin color, and constitutes classification and discrimination of the most invidious sort.

The Court of Appeals for the Tenth Circuit applied a test of constitutionality to the federal program at issue which was incorrect. It applied a "lenient standard, resembling intermediate scrutiny," in assessing the federal program's constitutionality, when the applicable precedents require the use of a standard of examination that, if it is not as demanding as "strict scrutiny" is certainly more rigorous than lenient "intermediate scrutiny" as applied by the Tenth Circuit.

The standard of review properly to be applied requires careful judicial evaluation to ensure that the federal program is based on objective standards of discrimination and disadvantage and that it employs a constitutionally permissible means for achieving constitutionally permissible objectives. These standards require that the government body making the classification have before it objectively verifiable data and that the decision maker objectively examine such data.

ARGUMENT

I.

THE COURT OF APPEALS APPLIED AN INCORRECT STANDARD IN DECIDING THE CONSTITUTIONALITY OF THE FEDERAL PROCUREMENT PROGRAM

In this case, Petitioner challenges the constitutionality of the "Subcontracting Compensation Clause" [SCC][1] provision incorporated in bid documents and contract documents used by the Central Federal Lands Highway Division [CFLHD] and the Small Business Act of 1953, as amended, 15 U.S.C. §631, *et seq.*, which is the statutory basis for the racial and ethnic preferences of the SCC program.

The SCC is a racial preference, as that term has been defined by this Court, because its criteria for eligibility include a racial or ethnic determinant. In administering the program, states, their agencies and local governments receiving federal highway funds must determine, in awarding contracts, whether a firm is owned and controlled by persons who are "economically disadvantaged." "Economically disadvantaged" persons are "those socially disadvantaged individuals whose ability to compete...has been impaired...as compared to others in the same business area who are not socially disadvantaged." 15 U.S.C. §637(a)(6) "Socially disadvantaged individuals are those who have been subjected to racial or ethnic prejudice or cultural bias...without regard to their individual qualities." 15 U.S.C. §637(a)(5). "Black Americans, Hispanic Americans,

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[1] The SCC program provides a "bonus" to prime contractors on federal highway construction projects of 10% of the amount of subcontracts the prime contractor awards to "Disadvantaged Business Enterprises" ["DBE"], up to 2% of the dollar amount of the prime contract if more than one DBE is awarded a subcontract, and limited to 1.5% of the prime contract amount if only one DBE is selected to be a subcontractor.

Native Americans, Asian-Pacific Americans and other minorities" are presumed to be disadvantaged. 15 U.S.C. §637(d)(3)(C); *see also* 48 C.F.R. 52.219-8.

This Court has held that a classification "drawn on the basis of race and ethnic status" is a racial classification. *Regents of the University of California v. Bakke*, 438 U.S. 265, 289 (1979).

The Court of Appeals for the Tenth Circuit, in a decision reported at 16 F.3d 1537 (1994), held that notwithstanding the use of a racial classification, the SCC program is not constitutionally infirm because "Congress has expressly mandated a race-conscious program" and a court must apply "a lenient standard, resembling intermediate scrutiny, in assessing the program's constitutionality." 16 F.3d 1537, 1544 (1994). The Tenth Circuit relied heavily on *Fullilove v. Klutznick*, 448 U.S. 448 (1980). We submit that the Tenth Circuit misconstrued *Fullilove* and in so doing applied a level of scrutiny that virtually negates the constitutional role of the judiciary in protecting all persons from discrimination and deprivation of equal protection of the law.

Fullilove focused on the 10% MBE set-aside in the Public Works Employment Act of 1977, Pub. L. No. 95-28, 91 Stat. 116 ["PWEA"]. In the six-person *Fullilove* majority which upheld the constitutionality of the act, there were three different opinions, each using a different test in analyzing the statute.

Chief Justice Burger, joined by Justices White and Powell, used a two-part standard: (1) whether the objective was within Congressional authority and (2) whether the limited use of racial and ethnic criteria was a constitutionally permissible means for achieving this objective and did not violate the equal protection component of the Due Process Clause of the Fifth Amendment. Chief Justice Burger wrote that a "program that employs racial or ethnic criteria, even in a remedial context, calls for a close examination," 448 U.S. at 472, emphasis supplied, and that there must be "careful judicial

evaluation to assure that any congressional program that employs racial or ethnic criteria to accomplish the objective of remedying the present effects of past discrimination." 448 U.S. at 480, emphasis supplied. "Any preference based on racial or ethnic criteria must necessarily receive a most searching examination to make sure it does not conflict with constitutional guarantees." (448 U.S. at 491, emphasis supplied)[2] Justice Burger also emphasized that the PWEA MBE program was a "pilot project...limited in extent and duration...." 448 U.S. at 489. He concluded that, notwithstanding deference due to the "politically responsive branches of Government....when such a program comes under judicial review, courts must be satisfied that the legislative objectives and projected administration give reasonable assurance that the program will function within constitutional limitations." 448 U.S. at 490.

Justice Powell, in a separate concurring opinion, referred to his opinion in *University of California Regents v. Bakke*, 438 U.S. 265 (1978) and invoked a strict scrutiny standard, stating that a racial classification is constitutionally prohibited unless it is a necessary means of advancing a compelling government interest, requiring that the government act to remedy the "disabling effects of identified discrimination," 448 U.S. at 496-497, and that the governmental body must make findings that demonstrate the existence of illegal discrimination. 448 U.S. at 498.

Justice Marshall, joined by Justices Brennan and Blackmun, advocated a less onerous test, one he had articulated in his joint separate opinion in *Bakke*; that test requires the courts to ask only whether the means were "substantially related" to an "important and articulated" remedial purpose. 448 U.S. at 518-519.

---

[2] *Fullilove* was decided in 1980, before there was any significant experience with SBA's application of the statutory preferences at issue under either PWEA or section 8(b).

Justice Stewart, joined by Justice Rehnquist, and Justice Stevens dissented in separate opinions. Justice Stewart, citing the long-established principle articulated by this Court that "racial discrimination is by definition invidious discrimination", 448 U.S. at 526, warned that "racial discrimination, even 'good faith' racial discrimination, is inevitably a two-edged sword, and [quoting from *Bakke*, 438 U.S. 265, 298] that '[P]referential programs may only reinforce common stereotypes...that certain groups are unable to achieve success without special protection based on a factor having no relationship to individual worth," 448 U.S. at 531, and that "Notions of 'racial entitlement' will be fostered, and private discrimination will necessarily be encouraged." 448 U.S. at 532.

Justice Stevens would have required that Congress clearly articulate the need and basis for a racial classification and "tailor[] the classification to its justification..." 448 U.S. at 545. He was specifically critical of the way Congress had approached the matter of defining the preferred class:

> The statutory definition of the preferred class includes 'citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos and Aleuts." All aliens and all nonmembers of the racial class are excluded. No economic, social, geographical or historical criteria are relevant for exclusion or inclusion. There is not one word in the remainder of the Act or in the legislative history that explains why any Congressman or Senator favored this particular definition over any other or that identifies the common characteristics that every member of the preferred class was believed to share. Nor does the Act or its history explain why 10% of the total appropriation was the proper amount to set aside for investors in each of the six racial subclasses.

448 U.S. at 535-536. Justice Steven continued: "Racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification.

Quite obviously, the history of discrimination against black citizens...cannot justify a grant of privileges to Eskimos or Indians." 448 U.S. at 537. The difficulties with PWEA identified by Justice Stevens have persisted in federal racial and ethnic preferences in programs adopted subsequent to PWEA.[3]

The issue of which group should receive business preferences

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[3] Drew S. Days, III, then a professor of law, commented on the standard established by *Fullilove*:

> Specifically, I find myself asking whether Congress and the Supreme Court, in enacting and approving the [PWEA], established standards for the formulation and judicial review of minority set-aside programs that, constitutionality aside, fall below those we ought to employ, given our justifiable national sensitivity to racial classifications.
>
> ****
>
> It is difficult to criticize the efforts of people of goodwill seeking to rid our society of its unfortunate legacy of racial discrimination. I would be the first to argue that minority business set-asides, have been proposed, adopted and judicially sanctioned by people acting out of the very best of motives. But more than good motives should be required when government seeks to allocate its resources by way of an explicit racial classification system. It must be shown that such a system is responsive to findings of racial discrimination, is designed to redress that problem, and is employed only so long as is necessary to achieve its remedial objective.

Drew S. Days, III, "Fullilove", 96 YALE L. J. 456, 456, 485 (1987).

was raised again in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). In that case, this Court, by a 6 to 3 vote, overturned the City's 30% minority business ["MBE"] set-aside. Justice O'Connor writing for the plurality said that the business set-aside:

> denies certain citizens the opportunity to compete for a fixed percentage of public contracts based solely upon their race. To whatever racial group these citizens belong, their "personal rights" to be treated with equal dignity and respect are implicated by a rigid rule erecting race as the sole criterion in an aspect of public decision making.
>
> Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are "benign" or "remedial" and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics.

488 U.S. at 493.

Croson affirmed the principle that the state and local public contracting programs using racial and ethnic classifications are subject to the strict scrutiny test. 488 U.S. at 493. Even if racial and ethnic classifications are found not to be in violation of the Fourteenth Amendment's equal protection clause, only "narrowly tailored" remedies for identified discrimination are permissible. Justice O'Connor, whose opinion was joined in by Chief Justice Rehnquist and Justices White, Kennedy and Stevens, and constituted the opinion of the Court, held that the city had failed to make even a prima facie showing of constitutional or statutory violation by the construction industry in Richmond. 488 U.S. at 500. She noted that the statements of the Richmond City Council that its ordinance was "remedial" and had a benign or legitimate purpose was entitled to little or no weight, and that the conclusory statements of proponents of the plan are of little probative value. Noting that the fact

finding processes of legislative bodies is generally entitled to a presumption of regularity and deferential judicial review, when a legislative body uses a suspect classification, such as race, "it cannot rest upon a generalized assertion as to the classification's relevance to its goals." 488 U.S. at 500.

While the Court in *Croson* recognized that it was applying a different level of scrutiny than did the principal opinion in *Fullilove*, the distinction between Congress and states and localities was that Congress, as the national legislature, "may identify and redress the effects of society-wide discrimination," 488 U.S. at 490, while state and local governments are limited to eradicating "the effects of...discrimination within [their] own legislative jurisdiction." 488 U.S. at 491-492. Under *Croson*, state and local jurisdictions must carefully examine which groups to include in their MBE program to meet the narrowly tailored standard.

We submit that while Congressional findings are entitled to appropriate deference by the courts, such deference is not synonymous with surrender of the constitutional power and duty of judicial review when individuals' constitutional rights are threatened.

In *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 110 S.Ct. 2997, *reh'g denied* 497 U.S. 1050 (1990) this Court held that notwithstanding the "great weight" given to decisions of Congress, even congressionally mandated "benign" race conscious measures must satisfy the equal protection requirement. In *Metro Broadcasting*, a severely divided Court, with four Justices writing the plurality opinion, in which Justice Stevens concurred, upheld programs of the FCC that were designed to enhance the diversity of views expressed via the broadcast media, not only for the benefit of minority group would-be station owners, but also for the benefit of the listening and viewing public.

The four dissenters, the Chief Justice and Justices O'Connor, Scalia and Kennedy argued that *Croson* requires that the Court

apply a strict standard of scrutiny to evaluate racial classifications. 110 S.Ct. at 3029. They believed, correctly we submit, that the guarantee of equal protection binds the federal government as well as the States. 110 S.Ct. at 3030. They distinguished between Congress' unique remedial powers under section 5 of Amendment Fourteen, to ensure that the States do not deny equal protection to any person, and the federal government's other powers. More important, they correctly construed *Fullilove* to require that Congressional acts that are based on racial classifications be based on the Government's compelling interest in remedying the effects of identified racial discrimination. 110 S.Ct. at 3033.

In *Metro Broadcasting* both Justice Stevens, concurring in the result, and the dissenters advocated a much more demanding degree of scrutiny than the plurality employed. Thus in *Metro Broadcasting*, a majority of the Court refused to adopt "intermediate scrutiny" as the appropriate test for examining the constitutionality of Congressional acts in the area of equal protection and affirmative action.

Moreover, we submit that *Metro Broadcasting* is distinguishable from the case at bar on at least two grounds: first, the federal government does not have in the field of construction the same singular interest and regulatory authority it has with respect to the natural monopolies that exist in localized radio and television broadcast markets; second, there is no special public interest in ensuring the diversity of contractors who build highways as there is in the breadth of choice available to the consumers of ideas delivered by the mass broadcast media.

To the extent that *Metro Broadcasting* articulated a less rigorous standard of scrutiny than is required by *Fullilove*, it is both distinguishable and wrong.

The Tenth Circuit, purportedly relying on *Fullilove*, held that the racial preferences challenged here are to be scrutinized using a "lenient standard, resembling intermediate scrutiny, in

assessing the program's constitutionality." 16 F.3d 1537, 1544 (1994)[4]. We submit that this is a serious misinterpretation of the weight of the opinions in *Fullilove*, and that *Fullilove*, properly interpreted and applied, requires that the judiciary undertake an examination of the challenged program that is much more critical than the Tenth Circuit's adoption of "intermediate scrutiny". In fact, in *Fullilove* six of the nine justices employed a much more searching level of scrutiny than "intermediate"; four held that PWEA survived that examination, while the two dissenters found that it did not. The Tenth Circuit mistakenly adopted the "intermediate scrutiny" test advocated by Justice Marshall and the two justices who joined him, but rejected by a majority of the Justices who decided the case.

II.

DETERMINATION OF "SOCIAL DISADVANTAGE" IS BASED ON A COLOR LINE

In *Fullilove*, Chief Justice Burger, reviewing the legislative and administrative history of federal affirmative action programs, noted that the PWEA MBE provisions were based on prior Small Business Administration [SBA] practice under section 8(a) of the Small Business Act of 1953, Pub. L. 85-536, 72 Stat. 389. 448 U.S. at 463-464. Indeed, the statutorily specified groups which are "presumptively" disadvantaged under the PWEA and subsequent federal

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[4] The Tenth Circuit stated that because Adarand acknowledged that CFLHD is merely doing what Congress mandated, the agency's action is constitutional unless the underlying legislation is unconstitutional (16 F.3d at 1544). It believed that "the only question to be resolved is whether the SCC program implemented by the CFLHD is narrowly tailored to achieve the remedial purpose of section 502." 16 F.3d at 1546. We submit that the inquiry thus restricted omits an essential issue: Are the racial and ethnic classifications in the statute constitutional?

contracting affirmative action programs closely track the categories administratively established by the executive branch, especially the SBA.

To qualify as eligible for the Subcontracting Compensation Clause program, small businesses must establish that they are "socially and economically disadvantaged" as defined by the Small Business Act. Examination of the history of the Act and its application of the term "socially and economically disadvantaged" reveals that decisions as to which groups were considered disadvantaged and which were not, were made arbitrarily and with neither logic nor fairness.

The Small Business Act originally was race and gender neutral legislation. Throughout the first 15 years after its passage in 1953, the Act aided all small businesses, not only those owned by individuals of particular groups[5]. This is no longer true. The Act now grants the benefit of presumptively disadvantaged status for the Subcontractor Compensation Clause to "Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, and other minorities," including those "found to be disadvantaged by the [Small Business] Administration pursuant to section 8(a) of the Small Business Act."[6]

The section 8(a) program's racial and ethnic neutrality ended in 1968, when the Small Business Administration decided administratively to construe its section 8(a) authority to establish set asides for small businesses owned by "socially or economically disadvantaged" individuals. At that time the

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[5] "It is the declared policy of the Congress that the Government should aid, counsel, assist, and protect, insofar as is possible the interest of small-business concerns in order to preserve free competitive enterprise ..." 15 U.S.C. 631(a).

[6] 15 U.S.C. 637 (d)(3)(C). Determinations of eligibility under the section 8(a) program carry over to other SBA-administered programs, and affect eligibility in the program at issue in this case.

amount of money awarded through section 8(a) began to increase dramatically, growing from $9 million in 1969 to more than $200 million in 1973.

Despite the large sums being awarded to businesses considered socially and economically disadvantaged, this term remained undefined until 1973 when the SBA published in the Federal Register a list of five groups "presumed" to be socially or economically disadvantaged: "[B]lacks, American Indians, Spanish-Americans, Asian-Americans, and Puerto Ricans." There were no hearings or formal findings as to why these particular groups had been included or why others had been excluded.

In 1978, Congress passed P.L. 95-507, the Small Business Investment Act, providing a statutory basis to what had been for a decade a purely administratively-based program, and establishing a three track system for participation. In the first track were small businesses owned by groups (Blacks, Hispanics, and Native Americans) which were considered presumptively "socially and economically disadvantaged." P.L. 95-507 defined socially disadvantaged individuals "as those who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities." "Economically disadvantaged individuals" were "those socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired ... as compared to others in the same business area who are not socially disadvantaged." Presumptive eligibility has meant in practice that an owner merely had to prove group membership and that the program's economic standards for "small business" were met. In the second track were businesses owned by members of groups who could petition SBA for presumptive eligibility. In the third track, individual owners were required to qualify on their own according to far more rigorous requirements than those for group eligibility.

This system remains in use today and is the reason why Gonzales Construction Company, the company which was

awarded the subcontract for guardrails, although it was not the lowest bidder, was presumed to be eligible for the Subcontracting Compensation Clause while Petitioner, Adarand Constructors, Inc. was similarly presumed ineligible.

Groups not presumed to be disadvantaged and which petitioned for minority status were evaluated by SBA on several measures. Petitioners had to make an "adequate showing" that the group had suffered racial, ethnic, or cultural bias by demonstrating:

(1) The group has suffered the effects of prejudice, bias, or discriminatory practices;

(2) Such conditions have resulted in economic deprivation for the group of the type which Congress has found exists for the groups named in Pub. L. 95-507, and

(3) Such conditions have produced impediments in the business world for members of the group over which they have no control and which are not common to all small business owners.[7]

Congressional intent that SBA not confine benefits solely to the groups listed in P.L. 95-507 was clear. The House Committee report accompanying the new law stated "[t]here is sufficient discretion . . . to allow SBA to designate any other additional minority group or persons it believes should be afforded the presumption of social and economic disadvantage."[8]

In the first of the tracks created by P.L. 95-507 were small businesses owned by those groups considered presumptively

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[7] 13 C.F.R. 124.105(d)(2)

[8] H.R. Rep. No. 949, 95th Cong. 2d Sess. 1978.

"socially and economically disadvantaged."[9] The groups granted presumptive eligibility by P.L. 95-507 were Blacks, Hispanics, and Native Americans. Asian-Americans were apparently inadvertently omitted.

Presumptive eligibility for the groups in the first track provides those groups with extraordinary advantages. The 8(a) program, for example, is administered through authority given to the SBA in the Small Business Investment Act. Billions of dollars are awarded each year through the 8(a) program. The program also serves as a model for many city, county, and state minority business programs around the United States, including federally funded highway projects such as the one in this case. The groups eligible for 8(a) are the same groups eligible for other federal, as well as state and local programs.

In the middle track created by P.L. 95-507 were businesses owned by members of groups that could petition for presumptive eligibility as socially and economically disadvantaged. In the third track, those seeking individual determination of social and economic disadvantage are persons who have to qualify on an individual basis. These individuals need to establish that he or she had suffered chronic disadvantage that had a tangible negative impact on entry or advancement in the business world. Individuals within the presumptively disadvantaged groups are not subjected to similar standards. Every person in the groups with presumptive eligibility, even those born into wealthy families or those newly arrived in the country, and without any experiences of discrimination, are permitted to participate in the 8(a) program.

The inclusion of groups as eligible, either by Congress or by the SBA has been arbitrary, and is based on no objective economic or sociological criteria. It includes some, but not all,

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[9] In practice, presumptive eligibility has meant that a business owner has only to prove group membership and that economic limitations of firm size and income had not been exceeded.

groups that have historically suffered discrimination, and it also includes groups which have only recently arrived in the United States and have no history of being discriminated against.

Since 1979, eight groups have petitioned the agency for presumptive eligibility. Of the eight petitioning groups Asian Indians, Tongans, Sri Lankans, and Indonesians were accepted; Hasidic Jews, women, disabled veterans, and Iranians were rejected. In 1988, Congress found that women as a group are presumptively eligible for most federal programs. However, women remain ineligible as a group for the 8(a) and SCC programs. *See generally*, George R. LaNoue and John C. Sullivan, Esq., "Presumptions for Preferences: The Small Business Administration's Decisions on Groups Entitled to Affirmative Action", 6 JOURNAL OF POLICY HISTORY 429 (1994) [hereafter "LaNoue and Sullivan"], which describes in detail the history of SBA's consideration of and decisions regarding theses applications, based on a close examination of the SBA's files.[10]

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[10] *See* LaNoue and Sullivan. Below is a summary of SBA responses to petitions for presumptive group eligibility in the 8(a) program, taken from LaNoue and Sullivan.

Group	Date of Original Petition	Date of Official Decision	Outcome	Decision Rationale
Hasidic Jews	12/27/79	4/19/80	Rejected	First Amendment concerns
Asian Indians	6/30/81	2/26/82	Accepted	Comparable to Asian-Pacific group
Women	12/24/81	5/11/82	Rejected	Not a traditional minority

In making determinations on the eight petitions, the SBA did not apply consistent standards for measuring social and economic disadvantage. Instead, the agency seems to have drawn a "people of color" line in deciding eligibility for the 8(a) program. The SBA accepted all petitions from non-white applicants, but rejected Iranians, Hasidic Jews, women, and disabled veterans, none of which is a non-white group.

For only the first of these petitioning groups, Hasidic Jews, was there any substantial debate over the decision to include or exclude a group.[11] Subsequent petitions were dealt with

Tongans	11/3/86	--	Accepted	Aug. 31, 1989 expansion of Asian Pacifics class
Service Disabled Veterans	8/10/87	12/16/87	Rejected	Vets are handicapped not minorities
Sri Lankans	10/20/87	2/24/88	Accepted	Subcontinent Asian Americans
Iranians	8/17/87	1/6/89	Rejected	Not long term bias victims
Indonesians	7/24/88	3/24/89	Accepted	Pacifics

[11] As Professor George R. LaNoue and John C. Sullivan, Esq. describe at 448-449, in a memorandum to Stuart Eizenstat, Assistant to the President for Domestic Affairs and Policy, staff reported on the controversy which was described as a "no-win situation." Edward Norton, SBA General Counsel, had determined that the language of PL 95-507 made it "clear that the 8(a) program is not exclusively a racially preferential program." Furthermore, Norton concluded after a thorough

review of the legislative history, "there does not appear to be a defensible legal justification for rejecting the Hasidic application" and that if such a rejection occurred litigation would result. Norton warned:

> In the event of litigation, the eligibility requirements for the 8(a) program will be strictly scrutinized by courts which might have sharply differing attitudes from SBA as to which groups should be considered socially disadvantaged. From SBA's standpoint, it is far preferable that it make those judgments.
>
> Litigation might also endanger affirmative action efforts in general. Thus far, the courts have given administrative agencies some leeway to make findings of discrimination and to take appropriate steps to remedy that discrimination. If SBA abstains from making such findings in a case where they appear to be clearly warranted, if not actually compelled by statute, a court might narrow substantially the authority administrative bodies now have to impose exclusively racial preferences as remedies for discrimination.

Norton then proposed that the Hasidic Jews be accepted, but on such narrow grounds that other groups could not take advantage of the precedent. This would be done by defining them as an ethnic group with a strange appearance, language problems, and unusual customs. This finding, he concluded:

> could be massively documented, both with anecdotal and statistical data. This would help to distinguish the Hasidim from other groups which may not be analytically distinguishable but which could not amass the same degree of evidence as can be done in this case.

In 1974, the SBA had itself recognized that Hasidic Jews had been hampered because of social or economic disadvantage and so were entitled to participate in the agency's Minority Enterprise Small Business Investment Company (MESBIC) program. Hasidic Jews are treated inconsistently by the SBA: the group is considered sufficiently disadvantaged for the agency's MESBIC program but not disadvantaged enough for the agency's 8(a) program or the SCC.

The petition of the Hasidic Jews stirred substantial controversy, and was aired in the press in New York and Washington.

internally at SBA.[12]

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[12] After the Hasidic Jewish petition was denied, the National Association of Americans of Asian Indian Descent (NAAAID) filed. The Asian Indian petition was rejected by SBA on September 24, 1981 in a response less than one-tenth the length of its reply to the Hasidic Jews. The SBA declared that NAAAID failed to make a prima facie showing on six of the seven standards.

The following year NAAAID tried again, submitting another petition. The petition addressed the issue of identifiability, an underlying theme to several of the deficiencies cited in the SBA's response to NAAAID's first petition. The 1982 petition identified color as the primary characteristic setting off Asian Indians as a discrete minority.

On February 26, 1982, the SBA "...[D]etermined that the petition is adequately documented and makes a prima facie showing as to each of the standards set forth in the Rules and Regulations."

In May, 1982 a notice in the Federal Register invited comments on the proposed inclusion of the Asian Indians. After receiving comments, in August 1982, the agency published another notice in the Federal Register which formally granted 8(a) inclusion to the Asian Indians and also granted presumptive minority eligibility to those from Pakistan and Bangladesh, even though no one from those countries had petitioned SBA.

On December 24, 1981 a petition on behalf of the National Association of Women Federal Contractors was submitted to SBA . Like other applicants, the women contractors stressed that P.L. 95-507 was "not limited to" (emphasis in original) the minority groups named in the legislation, but they also had a strong case for their particular petition. They quoted the House Small Business Committee's Subcommittee on Minority Enterprise and General Oversight on P.L. 95-507 which said:

> women, as a class of individuals, have been and continue to be excluded from equitable participation in our economy as business owners. This lack of access to our business system is the direct and indirect result of sex discrimination.

In 1979, Asian-Americans, who had not been included in the statutory language of P.L. 95-507 as one of the presumptively eligible groups, lobbied to be reinstated. No formal SBA process was involved. In July, 1979, the SBA divided Asian-Americans into two categories. The first was "Asian Pacific Americans," consisting of American citizens from Japan, China, the Philippines, Vietnam, Korea, Samoa, Guam, the U.S. Trust Territory of the Pacific, the Northern Marianas, Laos, Cambodia, and Taiwan. A decade later, The Asian Pacific category added Burma, Thailand, Malaysia, Singapore, Brunei, Republic of the Marshall Islands, and the Federated States of Micronesia. The second category of Asian Americans established in 1979 was "Subcontinent Asian-Americans," consisting of persons from India, Pakistan, Bangladesh, Sri Lanka, Bhutan, and Nepal.[13]

Examining this record, it is difficult to discern any consistent application of the SBA's published procedural or substantive

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and then concluded that "the government should utilize its vast purchasing power to assist female-owned businesses as well as small and minority businesses." Notwithstanding the fact that women-owned business enterprises (WBEs) were included in many set-asides and goal programs, such as those of the Department of Energy, the Department of Transportation, and the Federal Deposit Insurance Corporation, as well as programs operated by many state and local governments, on May 11, 1982, SBA issued a single page denial of the women's petition "based upon our findings that presumptive group 'social disadvantage' is primarily intended for the traditional 'minority' groups and should not be extended to the broader class of 'women.'"

Subsequent to these filings in the early 1980's, several other groups -- Tongans, disabled veterans, Sri Lankans, Iranians, and Indonesians -- applied for presumptively disadvantaged status. The applications of the disabled veterans and the Iranians were denied, the others granted. *See* LaNoue and Sullivan, *passim*.

[13] 54 Fed. Reg. 12057 (1989). For unstated reasons, the SCC does not list Subcontinent Asian-Americans among the presumptively eligible groups.

standards.[14]

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[14] Chronology of Groups Presumptively Eligible for MBE Preferences

Source	Date	Changes in Groups	Comment
Executive Order 11625	10/13/71	Negroes, Puerto Ricans, Spanish-speaking Americans, American Indians, Eskimos, Aleuts	Possibly the earliest listing of groups. Superseded E.O. 11458, which did not list any groups.
38 Fed.Reg. 13729	5/25/73	*Black Americans*, American Indians, *Spanish-Americans*, oriental Americans, (Puerto Ricans)	SBA's first listing. Earlier regulations simply stated "socially or economically disadvantaged" persons.
Public Works Employment Act, P.L. 95-98	5/13/77	*Negroes, Spanish-speaking, Orientals, Indians*	Rep. Parren Mitchell's Amendment which set aside 10% of $4 billion PWEA for the listed groups.
Small Business Investment Act, P.L. 95-507	10/24/78	*Black Americans, Hispanic Americans, Native Americans* includes Indians, Eskimos, Aleuts	Congress passed this law to reform the 8(a) program; Asian-Americans were omitted.
44 Fed.Reg. 30673	5/29/79	Hawaiians	Added Hawaiians to Native Americans.

SBA ruling	7/6/79	Asian Pacific Americans; from Japan, China, Philippines, Vietnam, Korea, Samoa, Guam, U.S. Territory of the Pacific Islands, Northern Mariana Islands, Laos, Cambodia, Taiwan	The SBA interim rule which, for the first time, defined an entire group -- Asian Pacific Americans.
SBA, 45 Fed.Reg. 42832	4/9/80	(Hasidic Jews)	Decision to reject Hasidic Jews based on First Amendment.
Small Business Admin. Act of 1980, P.L. 96-302	7/2/80	Asian Pacific Americans	Legislative approval to the groups administratively added by the SBA.
SBA ruling	5/11/82	(Women)	SBA unwilling to extend traditional ethnic and racial coverage group to broader class of women.
SBA ruling	7/26/82	Asian Indians	Accepted petition, later all Indian Subcontinent persons added

SBA ruling	11/3/86	(Tongans) Tongans 1989	In first ruling, Tongans had not made a case. They were added in 1989 expansion of Asian Pacific group.
SBA ruling	12/16/87	(Disabled Veterans)	Prejudice against disabled veterans was caused by their handicaps, not veterans' status.
SBA ruling	7/25/88	Indonesians	SBA never ruled on petition; Indonesians added in March, 1989 as part of expansion of Asian Pacific group.
SBA ruling	3/15/88	Sri Lankans	Sri Lankans considered Subcontinent Asian Americans.
SBA ruling	1/6/89	(Iranians)	Prejudice against Iranian-Americans not sufficiently long-standing.

SBA, 54 Fed.Reg. 12057	3/23/89	Asian Pacific Americans: from Burma, Thailand, Malaysia, Indonesia, Singapore, Brunei, Japan, China, Taiwan, *Kampuchea*, Vietnam, Korea, the Philippines, *Trust Territory of the Pacific Islands (Republic of Palau.)* Republic of the Marshall Islands, Federated States of Micronesia, the Commonwealth of the Northern Mariana Islands, Guam and Samoa; Subcontinent Asian-Americans; India, Pakistan, Bangladesh, Sri Lanka, Bhutan and Nepal. (Laos)	Rule added eight countries to Asian Pacific group and added an entire new category, "Subcontinent Asian Americans." Most of these changes reflected existing SBA rules.
SBA, 54 Fed. Reg. 34717	8/21/89	Asian Pacific Americans: *Cambodia (Kampuchea)*, Macao, Hong Kong, Fiji, Tonga, Kiribati, Tuvalu, Nauru); Subcontinent Asian Americans, the Maldives	Reinstated Laos, which had been inadvertently deleted; and added eight other countries.

Source: Derived from LaNoue and Sullivan, *passim*.

While determining the relative social disadvantages of groups may be necessarily subjective, the relative economic disadvantage of groups is quantifiable and the data were often available from Census records. SBA never used the available Census data, nor did it analyze that data when petitioners introduced it, but instead employed a variety of rationales that appear largely to be pretexts for its decisions. The putative requirement that there be evidence of "long term" prejudice and discrimination in American society, used to exclude Iranians and disabled veterans, was not applied to other new immigrant groups such as Asian Indians or the Asian Pacific Islanders.

Similarly, the application of the standard that groups not be too narrow and represent only an individual nation, which was used as a basis for rejecting against the Iranians' petition, is inconsistent with the fact that when SBA expanded eligibility throughout much of Asia, the agency did so on a country-by-country basis, adding Burma, Japan, etc. It informed the Tongans in 1987 that they were too small a group to "warrant an SBA determination of minority group status" but admitted them in 1989 along with people from the Marshall Islands and Micronesia.[15]

The SBA turned down women because it did not wish to extend beyond "8(a) traditional minority groups," although women were participants in other federal programs and evidence of cultural discrimination against women in business was substantial. In 1988, Congress effectively overturned that decision by adding women to the rest of SBA's "portfolio," but women are still not eligible for section 8(a) set-asides. The agency rejected disabled veterans, although disability and veteran status are common in other affirmative action programs. Although Hasidic Jews were already eligible for other Department of Commerce and SBA programs and the existence of discrimination against them was clear, they were excluded from 8(a) participation ostensibly on constitutional

[15] Letter from Wilfredo Gonzales, April 23, 1987 at 2, cited by LaNoue & Sullivan at 454 n. 55.

(separation of church and state) grounds, without citing any statute or court case.

On the other hand, when the agency did expand eligibility, as it did in 1979 when persons from twelve Asian countries were brought in, or, in 1982, when persons from the Indian sub-continent were included, it did so without any independent examination of the actual social or economic status of those groups in America. Had SBA done so, it would have discovered that Asian Americans, specifically Asian Indians, Chinese and Japanese, are the best educated and most prosperous of all the nation's larger racial groups and have made great strides in developing businesses.[16] [17]

[16] United States Civil Service Commission, "Civil Rights Issues Facing Asian Americans in the 1990's" at 11-12 (February 26, 1992).

[17] Education and Income by Affirmative Action Groups (1980)

Group	Percentage High School Graduates	Family Median Income
Asian-American	76.4	$24,133
White	69.9	$21,014
American Indian	55.8	$13,678
Hispanic	45.4	$14,712
Black	51.2	$12,627
Eskimos/Aleuts	44.3	$15,660

[Source: U.S. Bureau of the Census, 1980 Census of the Population, General Social and Economic Characteristics United States Summary, (Washington, D.C.: G.P.O., 1983) Tables 166, 170, 171]

A skin-color hypothesis explains why the SBA has accepted petitions from persons from every non-white Asian country, but has rejected Iranians, and, for that matter, why it did not add Afghanis, when it added Nepal and Bhutan in 1989. It would also explain why the petition of the Hasidic Jews, women, and disabled veterans were rejected.

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[17] (cont'd)

Business Participation Rates of Selected Ethnic Groups

Ancestry Group	Business Formation per 1000 population	Mean Income from All Sources of Self Employed Persons
Korean	69.2	$18,500
Japanese	64.8	19,680
Chinese	60.2	18,980
U.S. Average	48.9	18,630
Cubans	47.9	17,310
Filipinos	22.4	27,800
Asian Indians	47.1	29,800
American Indians	33.3	13,110
Subsaharan Africans	13.6	11,260
Puerto Ricans	10.6	11,490

Source: Frank A. Frato and Ronald L. Meeks, Office of Advocacy, Research and Information, Minority Business Development Agency, U.S. Department of Commerce, "Business Participation Rates of the 50 Largest U.S. Ancestry Groups: Preliminary Report" (1985), in George R. LaNoue and John C. Sullivan, " 'But for' Discrimination: How Many Minority-Owned Businesses Would There Be?", 24 Colum. Human Rights L. Rev. 293, 132 (Winter 1992-1993).

SBA's decision to draw a "people of color" line around its formal Congressional mandate, as evidenced by its formal Policy and Procedural Release No. 2017.

In drawing the color line, as SBA appears to have done, it ignores the reality that in the world of small businesses, race and ethnicity are not very good surrogates for size or success. In 1982, 64% of all businesses owned by white males had net receipts of less than $25,000, compared to 69% of firms owned by Hispanics, 70% of firms owned by Blacks, and 65% of firms owned by other minorities (mostly Asians). Similarly 81% of all businesses owned by white males had no paid employees compared to 84% of firms owned by Hispanics, 87% of firms owned by Blacks, and 81% of firms owned by other minorities.

SBA's reliance on a color line has led it to make decisions inconsistent with both the historical record and the contemporary evidence of discrimination in America. It has included groups (Tongans and Sri Lankans) for whom there was no history of discrimination because they were barely present in the country until recently, while excluding groups which have faced discrimination since the founding of the Republic (Jews and women). By refusing to apply an empirical test of contemporary socio-economic status, the agency was left with no principled basis on which to include Asian Indians and exclude Iranians, both recent immigrant groups.

The SBA's determinations are arbitrary and do not effect the purposes of the Small Business Act, nor do they further a legitimate and important, much less a compelling government interest.

CONCLUSION

The use of a color line by the SBA in determining presumptive disadvantage has created a racially biased Subcontracting Compensation Clause program. That program does not withstand the careful judicial evaluation required by the constitutionally mandated degree of scrutiny.

For the reasons discussed above, the judgment of the Court of Appeals for the Tenth Circuit should be reversed.

November 8, 1994

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No. 93-1841

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

ADARAND CONSTRUCTORS, INC.,
Petitioner,

v.

FEDERICO PENA, Secretary of Department of Transportation; THOMAS D. LARSEN, Administrator of the Federal Highway Administration; LOUIS N. MacDONALD, Administrator Region VIII of the Federal Highway Administration; and JERRY BUDWIG, Division Engineer of the Central Federal Lands Highway Division,
Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF OF WASHINGTON LEGAL FOUNDATION AND EQUAL OPPORTUNITY FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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30 pp

QUESTION PRESENTED

Amici will address the following question:

(1) Whether, in an as-applied challenge, a federal race-conscious set-aside program for awarding highway construction contracts survives constitutional scrutiny when that program was not adequately explained by a statement of legislative/administrative purpose but rather was developed in a haphazard, internally inconsistent manner?

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1994

No. 93-1841

ADARAND CONSTRUCTORS, INC.,
Petitioner,

v.

FEDERICO PENA, Secretary of Department of Transportation, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF OF WASHINGTON LEGAL FOUNDATION AND EQUAL OPPORTUNITY FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTERESTS OF *AMICI CURIAE*

The Washington Legal Foundation is a non-profit public interest law and policy center with more than 100,000 members and supporters nationwide. While WLF engages in litigation and the administrative process in a variety of areas, WLF devotes a substantial portion of its resources to promoting economic liberty, free-enterprise principles, and a limited and accountable government.

WLF has a record of longstanding interest and involvement regarding the controversial issues of affirmative action, racial quotas, and reverse discrimination. In pursuit of its view that the Constitution and the civil rights laws protect all citizens against

discrimination, WLF has appeared before this Court as well as other state and federal courts in many of the leading cases in the area. *See, e.g., Shaw v. Reno*, 113 S. Ct. 2816 (1993); *Metro Broadcasting, Inc. v. Federal Communications Comm'n*, 497 U.S. 547 (1990); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984); *United Steelworkers v. Weber*, 443 U.S. 193 (1979); *Podberesky v. Kirwan*, No. 93-2527, ___ F.3d ___ (4th Cir. Oct. 27, 1994).

The Equal Opportunity Foundation (EOF) is a non-profit educational organization founded in 1987 dedicated to establishing in America a colorblind government in a colorblind society, and, to that end, to protecting the civil rights of all Americans. EOF has appeared before this Court as *amicus curiae* on a number of occasions, including in *Shaw v. Reno*, 113 S. Ct. 2816 (1993), and *St. Mary's Honor Center v. Hicks*, 113 S. Ct. 2742 (1993).

Because of *amici*'s unique perspective in their commitment to a free market where individuals can compete without suffering from intentional race-based discrimination, their brief will bring relevant matter to the attention of the Court that most likely will not be raised by the parties. *Amici* submit this brief in support of Petitioner with the written consent of all parties. The written consents are on file with the Clerk of the Court.

STATEMENT OF FACTS

In the interests of judicial economy, *amici* hereby adopt by reference the Statement of the Case contained in Petitioner's brief.

In brief, Petitioner Adarand Constructors, Inc. ("Adarand") is a highway construction company which specializes in the installation of guardrail systems and highway signs. In 1989, Adarand was the low bidder on a guardrail subcontract let by Mountain Gravel & Construction

Company ("Mountain Gravel"), which had won a contract from the federal government to construct five miles of highway in a national forest in southwestern Colorado.

Despite Adarand's low bid, Mountain Gravel awarded the guardrail subcontract to Gonzales Construction ("Gonzales"). Although Gonzales's bid was higher, awarding the subcontract to Gonzales instead of Adarand resulted in a lower net cost to Mountain Gravel, due to a system of contract incentives employed by the Central Federal Lands Highway Division (CFLHD), the federal agency that issued the highway construction contract to Mountain Gravel.[1]

CFLHD's contract with Mountain Gravel included a clause known as the Subcontracting Compensation Clause (SCC), which provides for a bonus payment to the prime contractor equal to 10% of the dollar value of subcontracts given to companies certified by CFLHD as "disadvantaged business entities" ("DBEs"). Because Gonzales had been certified by CFLHD as a DBE and Adarand had not, the availability of a bonus payment to Mountain Gravel if it subcontracted to Gonzales (but not if it contracted to Adarand) made it economically advantageous for Mountain Gravel to award a subcontract to Gonzales despite Adarand's lower bid.

CFLHD includes a Subcontracting Compensation Clause (included in the Joint Appendix at 24-27) as § 108 of all its sealed-bid contracts. The SCC defines a "DBE" as including: (1) "a small business concern owned and controlled by socially and economically disadvantaged individuals as defined under the FAR [Federal Acquisition Regulation] Contract Clause 52.219-8 [48 C.F.R. § 52.219-8]"; and (2) "a woman owned business as defined

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[1] CFLHD is a regional division of the Federal Lands Highway Program (FLHP). The FLHP is part of the Federal Highway Administration, which in turn is part of the U.S. Department of Transportation (DOT).

under FAR Contract Clause 52.219-13 [48 C.F.R. § 52.219-13]." FAR 52.219-8 states that a prime contractor "shall presume" that Hispanic Americans (as well as members of a number of other ethnic groups) are "socially and economically disadvantaged"; Gonzales obtained its DBE status based on that presumption, because it is owned and controlled by a Hispanic American.[2]

CFLHD apparently developed its practice of including the SCC in its sealed-bid contracts (a practice hereinafter referred to as the "SCC Program") based on two federal statutes: the Small Business Act ("SBA"), 15 U.S.C. § 631 *et seq.*, and the Surface Transportation and Uniform Relocation Assistance Act of 1987 ("STURAA"), Pub. L. No. 100-17, 101 Stat. 132. The SBA provides that the President annually shall establish a "Government-wide goal" for the award of federal government procurement contracts to DBEs and that the goal may be no lower than 5% of the total value of all federal government procurement contracts. 15 U.S.C. § 644(g)(1). The SBA further provides that each agency within the federal government annually must establish a goal for DBE contract participation that presents, for that agency, "the maximum practical participation" by DBEs in the agency's contracts. *Id.* In no event, however, does the SBA permit an agency's DBE-participation goal to be lower than the President's government-wide goal. *Id.*[3]

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[2] Interestingly, there is absolutely no requirement under the SCC that a women-owned business be owned or controlled by a socially and economically disadvantaged individual in order to qualify as a DBE; such a business automatically qualifies as a "DBE" within the SCC's definition of that term so long as it meets FAR 52.219-13's definition of "women-owned."

[3] The SBA does not mandate that an agency attain its DBE contract participation goal. However, agencies that fail to meet their annual goals must provide to the Small Business Administration written justifications for their failure to do so. 15 U.S.C. § 644(h)(1).

STURAA authorized the appropriation of federal transportation funds for a variety of purposes for fiscal years 1987 through 1991; the highway construction contract awarded to Mountain Gravel drew on funds appropriated under STURAA. STURAA provides that at least 10% of funds authorized to be appropriated under the act "shall be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals." STURAA, § 106(c)(1). As *amici* discuss in more detail *infra*, STURAA's definition of "small business concerns owned and controlled by socially and economically disadvantaged individuals" differs in material respects from the SBA's definitions of that term. Neither the SBA nor STURAA makes reference to establishment of programs anything akin to the SCC Program.

Adarand objected that CFLHD had discriminated against it on the basis of race by including the SCC in the Mountain Gravel prime contract. It argued that the discrimination consisted of providing financial incentives to Mountain Gravel to choose subcontractors from a class of companies defined in large part by the company owner's race.

Adarand filed suit for declarative and injunctive relief against various DOT officials on August 10, 1990 in U.S. District Court for the District of Colorado. The suit alleged that use of the SCC violated the Fifth and Fourteenth Amendments to the U.S. Constitution as well as Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.* The district court granted summary judgment to defendants on April 21, 1992 (Pet. App. 27-37), and the U.S. Court of Appeals for the Tenth Circuit affirmed that decision on February 16, 1994. Pet. App. 1-24. This Court granted Adarand's *certiorari* petition on September 26, 1994.

SUMMARY OF ARGUMENT

The Court has repeatedly made clear that government-sponsored racial discrimination is highly disfavored under

the law. Racial classifications are no less suspect simply because they are employed on behalf of a historically disadvantaged minority group rather than on behalf of the white majority.

Although Respondents claim to be providing preferences to "disadvantaged" individuals without regard to race, the programs at issue in this case cannot qualify as race-blind because they invoke race to create presumptions of disadvantage. In other words, the government is conferring a significant benefit -- access to a presumption of social and economic disadvantage that is the key to valuable entitlements -- on grounds that are highly disfavored.

Amici concur with Adarand's contention that the federal government has violated its rights under the equal protection component of the Fifth Amendment's Due Process Clause by failing to demonstrate that the racial preferences granted under the SCC were narrowly tailored to remedy present effects of past discrimination. However, *amici* believe that the racial preferences at issue are unconstitutional for the additional reason that they were adopted in a haphazard manner, with little apparent regard for the program's remedial effects or even for internal consistency.

Judicial review under the Fifth Amendment's Due Process Clause includes consideration not only of the substance of the action under review (*e.g.*, did the action comport with principles of equal protection) but also of the procedural character of the decisionmaking process. When Congress is adopting measures (such as racial classifications) that raise such troubling and fundamental constitutional concerns, due process demands that Congress act in a deliberate manner that demonstrates to reviewing courts that it has weighed both costs and benefits and has given thought to the extent of racial preferences that are necessary to achieve remedial goals. Because Congress has not acted in a deliberate manner in this case, its efforts

at racial line-drawing cannot pass muster under the Due Process Clause.

ARGUMENT

I. RACIAL CLASSIFICATIONS ARE HIGHLY DISFAVORED UNDER THE LAW, AND THE CLASSIFICATIONS EMPLOYED IN THIS CASE WERE INARGUABLY RACIAL IN NATURE

A long line of decisions from this Court makes clear that programs that discriminate on the basis of race are highly disfavored under the law. Racial classifications are a "highly suspect tool" that reviewing courts should uphold only under extremely limited circumstances. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 483 (1989) (plurality opinion); *id.* at 520 (Scalia, J.). That is so because, "Classifications of citizens solely on the basis of race 'are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.'" *Shaw v. Reno*, 113 S. Ct. 2816, 2824 (1993)(quoting *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)). Courts are also mindful of the potential harmful effects of even the most remedial of racial classifications: "Racial classifications of any sort pose the risk of lasting harm to our society. They reinforce the belief, held by too many for too much of our history, that individuals should be judged by the color of their skin." *Shaw v. Reno,* 113 S. Ct. at 2832.

Racial classifications are no less suspect simply because they are employed on behalf of a historically disadvantaged minority group rather than on behalf of the white majority. *Croson*, at 494 (plurality opinion); *Regents of University of California v. Bakke*, 438 U.S. 265, 295-99 (1978)(Powell, J.). *Shaw v. Reno* put to rest any argument that the Court will treat deferentially racial classifications that favor groups that suffered from past discrimination. In a decision that called into question the constitutionality of drawing congressional districting lines according to the race of constituents, the Court said:

> [The dissent] argues that racial gerrymandering poses no constitutional difficulties when district lines are drawn to favor the majority. . . We have made clear, however, that equal protection analysis "is not dependent on the race of those burdened or benefitted by a particular classification." *Croson*, 488 U.S., at 494 (plurality opinion) see also *id.*, at 520 (Scalia, concurring in judgment). Accord *Wygant [v. Jackson Board of Education]*, 476 U.S. [267,] 273 [(1986)] (plurality opinion). Indeed, racial classifications receive close scrutiny even when they may be said to burden or benefit the races equally.

Shaw v. Reno, 113 S. Ct. at 2829.

Despite the highly suspect nature of all racial classifications, they are nonetheless permissible in limited circumstance; for example, for the purpose of overcoming the present effects of past discrimination. But a mere statement that one's purpose is to overcome the present effects of past discrimination in no way lessens the need for judicial inquiry because "[a]bsent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics." *Croson*, 488 U.S. at 493.[4]

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[4] The one occasion on which the Court was willing to impose a more deferential standard of review based on a government actor's assertion that its race-based classifications were "benign" was *Metro Broadcasting, Inc. v. Federal Communications Commission*, 497 U.S. 547 (1990). But *Metro Broadcasting* is distinguishable as a First Amendment case in which the Court was willing to defer to congressional regulation of broadcasting "in order to protect the rights of the viewing and listening audience" in a case in which the racial preference at issue had been "specifically approved -- indeed, mandated -- by Congress." *Id.* at 567, 563. The broader pronouncements of *Metro* (continued...)

The odious nature of racial classifications is not lessened simply because it is the federal government, rather than a state or local government, that has employed the classification. A federally-mandated racial classification creates the same dangers of "lasting harm to our society" as does a classification mandated at some other level of government, and it is just as destructive of "the doctrine of equality." Moreover, there is no reason to believe that a federally-drawn racial classification is any less likely to be "motivated by illegitimate notions of racial inferiority or simple racial politics" than is one drawn at the state or local level. Accordingly, there is no reason for the courts to approach a racial classification less suspiciously simply because it is federally drawn.

The parties to this action have engaged in a lengthy debate over what to call the level of judicial scrutiny to be given to the SCC Program. Adarand argues for "strict scrutiny," while Respondents have argued for a somewhat lesser degree of scrutiny.[5] *Amici* take no position in that debate (other than to take exception to the court of appeals's characterization of "intermediate scrutiny" as a "lenient" standard of review), because we see little point in focusing on the precise wording of the proper standard of review. Rather than attempting to create a host of finely-gradated standards of review, *amici* urge the Court to approach all cases involving challenged racial classifications with a recognition of the need for searching

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[4] (...continued)
Broadcasting are difficult to reconcile with the Court's earlier pronouncements in *Croson* and its later pronouncements in *Shaw v. Reno*. Accordingly, *Metro Broadcasting* appears to be an aberration whose continued vitality is limited to cases involving broadcasting issues.

[5] The court of appeals sided with Respondents in this debate. Citing *Fullilove v. Klutznick*, 448 U.S. 448 (1980), the court of appeals held, "if Congress has expressly mandated a race-conscious program, a court must apply a lenient standard, resembling intermediate scrutiny, in assessing the program's constitutionality." Pet. App. 15.

review, both of the motives of those drawing the racial classifications and of the effects of those classifications.[6]

Perhaps mindful of the Court's oft-expressed disapproval of racial classifications, Respondents argue that the classifications involved in this case are not really racial but rather are an effort to distinguish individuals who have faced social and economic disadvantage, from those individuals who have not. *See* Respondents' Opposition to Petition for Certiorari at 12-13. Respondents contend, "There is no question on the record in this case that Gonzales was in fact disadvantaged, and [Adarand] was not." *Id.* That statement is a mischaracterization of the record. All that the record shows is that Gonzales was presumed to be "disadvantaged" (within the meaning of the SCC) by virtue of its owner's Hispanic-American heritage, and that Adarand was presumed not to be "disadvantaged" because its owner was not a member of one of the favored races. In sum, on this record the only distinction between Gonzales and Adarand is racial.

The racial nature of the SCC's line-drawing is not diminished by arguing that Adarand could have overcome the effects of the SCC's racial presumptions by either: (1) challenging Gonzales's claim to DBE status under 13 C.F.R. § 124.603; or (2) seeking DBE status for itself. A racial presumption does not lose its status as racial discrimination simply because it is possible for those harmed by the presumption to overcome its effects. As Judge Posner of the Seventh Circuit has written, in

[6] The Thirteenth and Fourteenth Amendments' grant to Congress of power to enforce those amendments has little bearing on the issue, since a court reviewing a congressionally mandated racial classification cannot determine whether the classification really promotes the guarantees of those amendments without first engaging in a careful inquiry. As Justice Powell noted in *Fullilove*, Congress's enforcement authority "must be exercised in manner that does not erode the guarantees of [the Thirteenth and Fourteenth] Amendments. The Judicial Branch has the special responsibility to make a searching inquiry into the justification for employing a race-conscious remedy." *Fullilove*, 448 U.S. at 510 (Powell, J., concurring).

rejecting a claim that the SBA's DBE program does not constitute racial discrimination:

> [A] racial presumption is a form of racial discrimination, as would be obvious if the state had a rebuttable presumption that black subcontractors ought not to be permitted to work on state highway projects. . . Anyone who is not [black, Hispanic, Asian, American Indian, or a woman] must prove that he is socially and economically disadvantaged in fact. The presumption can be rebutted, but given the difficulty of establishing whether a particular individual is socially and economically disadvantaged the availability of the presumption is likely to be decisive. This means that the state is conferring a significant benefit -- access to a presumption of social and economic disadvantage that is the key to valuable entitlements -- on grounds that *Croson* forbids a state to use without establishing that the purpose is to rectify invidious discrimination. The state can if it wants redistribute wealth in favor of the disadvantaged, but it cannot get out from under *Croson* by pronouncing entire racial and ethnic groups to be disadvantaged.

Milwaukee County Pavers Ass'n v. Fiedler, 922 F.2d 419, 421-22 (7th Cir.), *cert. denied*, 500 U.S. 954 (1991).[7]

In sum, there can be no serious argument that the discrimination endured by Adarand in this case is not

[7] Nor could Respondents seriously argue that the voluntary decision of a nongovernment actor (Mountain Gravel) to award the guardrail subcontract to Gonzales insulates them from a racial discrimination claim. Such an argument is akin to arguing that a government entity is not engaged in racial discrimination if it awards a bounty to real property owners who sell their property to whites but not to those who sell to nonwhites -- because the government has done nothing affirmatively to prevent real property owners from selling to nonwhites. Clearly, no court would accept the latter argument.

racial in nature. Consequently, Respondents' actions in this case are inherently suspect and must be subjected to a searching inquiry.

II. THE HAPHAZARD MANNER IN WHICH THE RACIAL PREFERENCES AT ISSUE WERE ADOPTED IS REASON ENOUGH TO FIND A DUE PROCESS VIOLATION

Adarand contends that the federal government has violated its rights under the equal protection component of the Fifth Amendment's Due Process Clause by failing to demonstrate that the racial preferences granted under the SCC were narrowly tailored to remedy present effects of past racial discrimination. While fully concurring in that argument, *amici* believe that the racial preferences at issue in this case are unconstitutional for the additional reason that they were adopted in a haphazard manner, with little apparent regard for the program's remedial effects or even for internal consistency.

The Due Process Clause is at least as concerned with procedure as it is with substance; quite apart from the question of whether the racial preferences at issue here are substantively defensible is the question of whether the manner in which those preferences were put into place comports with notions of due process. At a minimum, the procedural component of the Due Process Clause demands that if the federal government intends to adopt "remedial" racial classifications, it must do so in a considered manner that demonstrates to reviewing courts that it has weighed both costs and benefits and has given thought to the extent of racial preferences that are necessary to achieve remedial goals.

As Justice Stevens argued in *Fullilove*:

> Whenever Congress creates a classification that would be subject to strict scrutiny under the Equal Protection Clause of the Fourteenth Amendment if it had been fashioned by a state legislature, it

> seems to me that judicial review should include a consideration of the procedural character of the decisionmaking process. A holding that the classification was not adequately preceded by a consideration of less drastic alternatives or adequately explained by a statement of legislative purpose would be far less intrusive than a final determination that the substance of the decision is not "narrowly tailored to the achievement of that goal." . . . If the general language of the Due Process Clause of the Fifth Amendment authorizes this Court to review Acts of Congress under the standards of the Equal Protection Clause of the Fourteenth Amendment -- a clause that cannot be found in the Fifth Amendment -- there can be no separation-of-powers objections to a more tentative holding of unconstitutionality based on a failure to follow procedures that guarantee the kind of deliberation that a fundamental constitutional issue of this kind obviously merits.

Fullilove, 448 U.S. at 551-52 (Stevens, J., dissenting).

The federal government's elaborate system of granting racial preferences in the award of construction contracts (hereinafter, the "Federal Construction Procurement Program") displays few of the earmarks of a carefully considered remedial program demanded under Justice Steven's due process analysis. Rather, it is a haphazard program marked by vague statutory language, inconsistent standards, resort to race as a short-hand method of determining disadvantage, and administrative programs adopted without regard to the extent of preferences necessary to overcome perceived continuing effects of past discrimination. In short, the Federal Construction Procurement Program violates the Fifth Amendment's Due Process Clause as a result of the procedurally deficient manner of its implementation.

As noted above, two separate federal statutes -- the SBA and STURAA -- provide the basis for CFLHD's DBE

program. The SBA provides several different definitions of a DBE, and neither is consistent with STURAA's definition.[8] Moreover, neither statute makes an effort to quantify how much preference for DBEs is necessary in order to remedy past discrimination; rather, they call on federal agencies to provide "at least" specified levels of funding to DBE, and the SBA declares a policy of providing to DBEs "the maximum practicable opportunity to participate in the performance of contracts let by any Federal agency." SBA § 8(d)(1), 15 U.S.C. § 637(d)(1).

The SBA. The CFLHD's obligation under the SBA to provide contracting opportunities to DBEs arise under 15 U.S.C. § 644(g)(1). That section requires the President annually shall establish a "Government-wide goal" for the award of contracts to DBEs and that the goal may be no lower than 5% of the total value of all federal government procurement contracts. Section 644(g)(1) further provides that each agency within the federal government annually

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[8] The principal inconsistency between the SBA and STURAA is that STURAA includes women within the presumptively-disadvantaged category (STURAA, § 106(c)(2)(B)) while the SBA does not. Up until this past month, the SBA made no special provision for women-owned businesses. On October 6, 1994, 15 U.S.C. § 644(g) was amended to create a government-wide goal for participation by women-owned businesses in procurement activities at 5% of the total value of all contract awards -- without regard to whether the women-owners are either socially or economically disadvantaged. *See* Federal Acquisition Streamlining Act of 1994, Pub. L. 103-355, § 7106(a)(2). In an apparent effort to mask the inconsistencies between the SBA's and STURAA's definitions of a DBE, Respondents argue that the SCC Program was initiated for the sole purpose of fulfilling the CFLHD's DBE contracting obligations under the SBA, 15 U.S.C. § 644(g). Respondents' Opposition Brief at 11 n.8. Respondents also cite to the Tenth Circuit's finding (Pet. App. 4) that STURAA does not provide statutory authority for the SCC Program. *Id.* That explanation of the origins of the SCC Program cannot be correct, because the SCC Program has for some time granted automatic DBE status to women-owned businesses, and such a preference for women-owned businesses could only have come from STURAA, not from the SBA. Thus, the SCC Program must have been developed to fulfill CFLHD's obligations under both STURAA and the SBA.

must establish a goal for DBE contract participation that presents, for that agency, "the maximum practical participation" by DBEs in the agency's contracts. In no event, however, does § 644(g)(1) permit an agency's DBE-participation goal to be lower than the President's government-wide goal.

Section 644(g) speaks in terms of a need to establish goals for contract participation by "small business concerns owned and controlled by socially and economically disadvantaged individuals." However, § 644(g) is silent regarding the definition of that phrase, nor does § 644(g) refer back to any other statutory provision for purposes of providing a definition.

A comprehensive definition is included at § 8(a)(4)(A) of the SBA, 15 U.S.C. § 637(a)(4)(A), but by its terms, that definition applies only to § 8 of the SBA.[9] Another

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[9] Section 8(a)(4)(A) provides:

> For purpose of this section, the term "socially and economically disadvantaged small business concern" means any small business concern which meets the requirements of subparagraph (B) [relating to control of the concern] and -
>
> (i) which is at least 51 per centum unconditionally owned by-
>
> (I) one or more socially and economically disadvantaged individuals,
>
> (II) an economically disadvantaged Indian tribe (or a wholly owned business entity of such tribe), or
>
> (III) an economically disadvantaged Native Hawaiian organization, or
>
> (ii) in the case of any publicly owned business at last 51 per centum of the stock of which is unconditionally owned by-

(continued...)

definition is included at § 8(d)(3)(C), 15 U.S.C. § 637(d)(3)(C), but that provision is not really a definitional section at all; rather, it sets forth contract language to be included in procurement contracts let by federal agencies.[10]

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[9] (...continued)

(I) one or more socially and economically disadvantaged individuals,

(II) an economically disadvantaged Indian tribe (or a wholly owned business entity of such a tribe), or

(III) an economically disadvantaged Native Hawaiian organization.

Section 8(a)(5) defines "socially disadvantaged individuals" as "those who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities."

[10] Section 8(d)(3) requires contract language which, *inter alia*: (1) states that it is United States policy that "small business concerns owned and controlled by socially and economically disadvantaged individuals shall have the maximum practicable opportunity to participate in the performance of contracts let by any Federal agency"; (2) requires the contractor to carry out that policy when awarding subcontracts "to the fullest extent consistent with the efficient performance" of the contract; and (3) defines (for purposes of the contract only) the term "small business concern owned and controlled by socially and economically disadvantaged individuals" as a small business concern:

> (i) which is at least 51 per centum owned by one or more socially and economically disadvantaged individuals; or, in the case of any publicly owned business, at least 51 per centum of the stock of which is owned by one or more socially and economically disadvantaged individuals; and
>
> (ii) whose management and daily business operations are controlled by one or more of such individuals.
>
> The contractor shall presume that socially and economically disadvantaged individuals include Black Americans, Hispanic American, Native Americans, Asian Pacific Americans, and

(continued...)

Moreover, § 8(d)(3)(C) states explicitly that its definitions apply only to terms used in contracts mandated under § 8(d)(2). Accordingly, one cannot be sure what entities Congress had in mind when it mandated (in § 644(g)) that each agency establish goals for contract participation by "small business concerns owned and controlled by socially and economically disadvantaged individuals."

Moreover, there are huge differences between the definitions of "socially and economically disadvantaged individuals" as set forth in § 8(a) and § 8(d). Section 8(d) includes the racial presumption to which Adarand objects so strenuously -- the presumption that all Black American, Hispanic Americans, Native Americans, and Asian Pacific Americans are "socially and economically disadvantaged." On the other hand, Section 8(a) contains no presumptions regarding social or economic disadvantage based on the race of small business owners.[11] DOT has simply assumed

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[10] (...continued)

other minorities, or any other individual found to be disadvantaged by the [Small Business] Administration pursuant to section 8(a) of the Small Business Act [15 U.S.C. § 637(a)].

15 U.S. C. § 637(d)(3)(C).

[11] Moreover, the legislative history of § 8(a) indicates that when it established the preference for socially disadvantaged individuals in 1978, Congress intended that preference to be invoked on a race-blind basis. The House of Representatives had adopted revisions to § 8(a) that would have included explicit presumptions that all members of certain racial and ethnic groups were socially and economically disadvantaged. House Report No. 95-949, 95th Cong., 2nd Sess. 24-25 (March 13, 1978). However, those presumptions were deleted from the bill as adopted (Act of October 24, 1978, P.L. 95-507) at the insistence of the Senate and the Conference Committee. *See* Sen. Report No. 95-1070, 95th Cong., 2nd Sess. 37 (May 17, 1978); 124 Cong. Rec. 29637 (Sept. 15, 1978)(remarks of Sen. Weiker); 124 Cong. Rec. 29639-40 (Sept. 15, 1978)(remarks of Sen. Nunn); H.R. Conf. Rep. No. 95-1714, 95th Cong., 2nd Sess. 21-22 (Oct. 4, 1978), *reprinted in* 1978 U.S. Code Cong. & Ad. News 3881-83 ("because of present and past discrimination many minorities have suffered social

(continued...)

(without providing any basis for doing so) that the racial presumptions set forth in § 8(d)(3)(C) are incorporated into the term "socially and economically disadvantaged individuals" as used in § 644(g). *Amici* respectfully suggest that a congressional intent to so incorporate the § 8(d)(3)(C) presumptions (but not § 8(a)'s lack of a presumption) cannot fairly be inferred from the statutory language -- particularly since § 644(g) includes a reference to § 8(a)[12] but no reference to § 8(d).

The SBA's vagueness also encompasses the extent to which socially and economically disadvantaged individuals are to be favored in the contracting process. The SBA

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[11] (...continued)
disadvantagement. . . However, the Conferees realize that other Americans may also suffer from social disadvantagement because of cultural bias. For example, a poor Appalachian white person who has never had the opportunity for a quality education or the ability to expand his or her cultural horizons, may similarly be found socially disadvantaged.")

Amici note that despite the language of § 8(a) and its legislative history, the Small Business Administration has interpreted § 8(a) as including the precise racial preferences that the Senate conferees had worked so hard to delete. *See* 13 C.F.R. § 124.105 (SBA presumes that members of the following groups are socially disadvantaged: Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans (defined as persons with origins from 26 listed countries), and Subcontinent Asian Americans (persons with origins from India, Pakistan, Bangladesh, Sri Lanka, Bhutan, the Maldive Islands, or Nepal)). Given § 8(a)'s (as well as § 644(g)'s) silence on the issue of racial preferences, it is probable that SBA possesses the *power* to issue such regulations. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). But the lack of any explicit congressional authorization for such regulations is one more reason to doubt that Congress adopted racial preferences with the requisite deliberateness necessary to withstand a due process challenge.

[12] Section 644(g)(2)(B) states that in order to carry out their mandate to establish annual goals for DBE participation and to "annually expand participation by small business concerns from each industry category in procurement contracts of the agency," agency heads are to consider awarding contracts for which bidding is restricted to § 8(a) contractors.

makes repeated reference to a requirement that DBEs be given the "maximum practicable opportunity" to participate in the performance of federal contracts. *See, e.g.*, 15 U.S.C. § 644(g)(1). Indeed, no matter how successful an agency has been in opening up contracting opportunities to socially and economically disadvantaged individuals, the agency is under a continuing duty to do better the next year by expanding such opportunities in "each industry category in procurement contracts of the agency." 15 U.S.C. § 644(g)(2). Use of such open-ended language is a clear indication that Congress has made no effort to narrowly tailor its racial preferences for the purpose of ensuring that they do no more than remedy the present effects of past discrimination.[13] Accordingly, the Federal Construction Procurement Program cannot pass muster under the Fifth Amendment's Due Process Clause.

STURAA. In contrast to the SBA's vagueness on the issue of whether racial preferences are warranted, STURAA is unambiguous in endorsing such preferences. Section 106(c)(2)(B) of STURAA expressly incorporate the racial presumptions of § 8(d)(3)(C) of the SBA and goes on to adopt a similar presumption for women:

> For purposes of this subsection, . . . The term "socially and economically disadvantaged individuals" has the meaning such term has under section 8(d) of the [SBA] (15 U.S.C. § 637(d)) and relevant subcontracting regulations promulgated pursuant thereto; except that women shall be presumed to be socially and economically

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[13] Indeed, there is considerable evidence that Congress and the Small Business Administration were not solely concerned with remedying present effects of past discrimination when they adopted the racial preferences at issue. *See, e.g.*, 15 U.S.C. § 631(f)(1)(A) ("the opportunity for full participation in our free enterprise system by socially and economically disadvantaged persons is essential if we are to obtain social and economic equality for such persons *and improve the functioning of our national economy*") (emphasis added).

disadvantaged individuals for purposes of this subsection.

STURAA further provides that "not less than 10 percent of the amounts authorized to be appropriated" under the act "shall be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals." STURAA, § 106(c)(1).

While STURAA does not suffer from vagueness problems, its language suggests an almost flippant attitude on the part of Congress regarding racial and sex preferences. The law includes no findings regarding the need for such preferences. The findings of past discrimination against DBEs contained in the SBA cannot be "borrowed" by STURAA in order to justify STURAA's racial preferences, because Congress used the SBA findings to justify a DBE participation "goal" of only 5% for all federal contracting, while STURAA imposes a mandatory floor of 10% DBE participation in all STURAA-funded projects -- without any effort being made to explain why the SBA goal needs to be doubled. Moreover, STURAA's requirement that DBE participation be "at least" 10% (thereby implicitly endorsing agency efforts to achieve higher participation rates, such as CFLHD's assigned goal of 12-15%) suggests that Congress has not sought to determine just how many race-conscious remedial steps are warranted as part of any effort to overcome past discrimination against DBEs.

Moreover, STURAA's inclusion of a presumption that women are "socially and economically disadvantaged" -- also without the benefit of findings -- is another sign of absence of serious deliberations by Congress prior to including racial preferences in the Federal Construction Procurement Program. Rather, the inclusion of a presumption favoring women has all the earmarks of pork-barrel politics, with Members of Congress who support "women's issues" arranging for the inclusion of a presumption in STURAA in return for support of other appropriations items in STURAA.

Despite an obvious need for detailed rules spelling out how STURAA is to applied (due to the absence of detail in the statute), DOT has not seen fit to issue regulations detailing STURAA's application to cases such as this one, in which DOT is entering into a direct procurement contract.[14] Accordingly, CFLHD has been left to its own devices regarding how it must implement its STURAA obligations to impose racial presumptions. The failure of DOT to issue implementing regulations regarding direct-procurement STURAA contracts,[15] despite Congress's mandate that racial classifications be employed in all such contracts, is further evidence of a constitutionally-fatal casualness in the use of such presumptions.

Part of CFLHD's response was to adopt the SCC Program which is at issue in this case. Respondents tout the SCC Program as a program that "does not impose a goal" for DBE participation, and that "operates as a carrot rather than a stick, [and thus] is even more flexible than the waivable MBE goal upheld in *Fullilove*." Respondents' Brief in Opposition to Petition for Certiorari at 17-18. *Amici* strenuously disagree. The SCC Program is the

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[14] DOT has issued regulations that provide guidance regarding DBEs for the vastly more common type of STURAA-expenditure situation in which federal funds are provided to state and local governments, which in turn enter into procurement contracts. *See* 49 C.F.R. Part 23, Subpart D. However, those regulations state on their face that they are inapplicable to direct procurements entered into by DOT; rather, they are only applicable to "DOT-assisted contracts" in which STURAA fund recipients (not DOT itself) enter into procurement contracts. *See* 49 C.F.R. § 23.63.

[15] Such procurement amounts to at least $55 million per year. *See* STURAA § 106(a)(10). The Small Business Administration's regulations with respect to the implementation of racial preferences imposed under the SBA -- 13 C.F.R. Part 124 -- provide some guidance regarding the proper treatment of DBEs in the STURAA contracting process; but they cannot address all issues arising under STURAA, which (unlike the SBA, at least prior to adoption of the Federal Acquisition Streamlining Act of 1994, Pub. Law 103-355, in October 1994) includes a presumption favoring women and a 10% floor for DBE participation.

most inflexible type of race-based preference program, because the government agency abdicates all control over the race-based decision-making and thus is not in a position to prevent decisions from being made on the basis of race when individual circumstances might suggest that race-based decision-making is inappropriate. For example, CFLHD was in no position to prevent Gonzales from being selected over Adarand for the guardrail subcontract on the basis of race,[16] no matter how unfair Adarand could have demonstrated such a selection to be. A program cannot be deemed "flexible" within the meaning of *Croson* and *Fullilove* unless the flexibility is in the hands of the program administrator who could, for example, determine that a program's remedial purposes have been fully served and thus that further race-based decision-making is unwarranted. The failure of Congress, DOT, and CFLHD to consider the need for such flexibility is further evidence of deficiency in the procedures by which the federal government decided to set up the Federal Construction Procurement Program.

Amici are also struck by the absence of any procedure by which the federal government can determine that its remedial purposes have been fully served. We note, for example, that an April 1992 GAO report, "Construction Contracts: Individual Sureties Had No Defaults on Fiscal Year 1991 Contracts" (GAO/ GGD-92-69), determined that minority contractors were awarded 19% of federal construction projects in 1991. Yet, even though those figures might suggest to some that members of racial

[16] One of principal justifications for DBE programs cited by program proponents has been that prime contractors are reluctant to do business with DBEs unless given extra incentives for doing so. Yet, Mountain Gravel selected Gonzales over Adarand for the guardrail subcontract solely because the net cost to Mountain Gravel (after taking into account the bonus payment from CFLHD) would be reduced slightly by using Gonzales. Accordingly, this case suggests that prime contractors are now willing to voluntarily do business with DBEs. Such evidence provides an additional reason for Congress to re-examine its commitment to wholesale racial classifications in the government contracting area.

minority groups no longer face unique obstacles in obtaining federal construction projects, Congress has failed to set up a procedure whereby it can consider whether those figures warrant eliminating racial presumptions from the SBA and STURAA.

Instead, the trend appears to be moving in the opposite direction: Congress and the Small Business Administration are constantly expanding the list of racial and ethnic groups entitled to a presumption of social and economic disadvantage. Moreover, a recent article that analyzed Small Business Administration decisions regarding the addition of groups to the SBA § 8(a) list of groups entitled to a presumption of disadvantage revealed a disturbing trend. Decisions regarding whether to add groups to the list are being made on the basis of skin color (with lighter-skinned groups -- such as Hasidic Jews and Iranians -- being denied the presumption, and darker-skinned groups -- such as Tongans and Sri Lankans -- being granted the presumption), not on the basis of the complex sociological factors set forth in the Small Business Administration's implementing regulation, 13 C.F.R. § 124.105(d). *See* G. LaNoue and J. Sullivan, "Presumptions for Preferences: The Small Business Administration's Decisions on Groups Entitled to Affirmative Action," Journal of Policy History (Fall 1994).

In sum, there is no evidence that Congress has given racial preferences the kind of mature reflection that a fundamental constitutional issue of this kind obviously merits. Rather, Congress now appears to treat the use of racial preferences as just another device for ensuring the continuation of pork-barrel politics. In light of that record, Congress's haphazard resort to racial preferences cannot fairly be characterized as a "narrowly tailored" response to perceived present effects of past discrimination, because the use of these racial preferences "simply raises too many serious questions that Congress failed to answer or even to address in a responsible way." *Fullilove*, 448 S. Ct. 552 (Stevens, J., dissenting).

CONCLUSION

Amici curiae Washington Legal Foundation and Equal Opportunity Foundation respectfully request that the Court reverse the decision of the United States Court of Appeals for the Tenth Circuit and order the entry of summary judgment in Petitioner's favor.

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1994

ADARAND CONSTRUCTORS, INC.
Petitioner,

v.

FEDERICO PENA, SECRETARY OF THE DEPARTMENT OF TRANSPORTATION, et al.,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Tenth Circuit

BRIEF AMICUS CURIAE OF THE FEDERALIST SOCIETY, OHIO STATE UNIVERSITY COLLEGE OF LAW CHAPTER, IN SUPPORT OF PETITIONER ADARAND CONSTRUCTORS, INC.

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QUESTION PRESENTED

Whether Race or Gender-Based Affirmative Action Programs Adopted By Congress Are Subject to Strict Scrutiny Under the Equal Protection Component of the Fifth Amendment's Due Process Clause.

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No. 93-1841

In The

Supreme Court of the United States

October Term, 1994

ADARAND CONSTRUCTORS, INC.

Petitioner,

v.

FEDERICO PENA, SECRETARY OF THE DEPARTMENT OF TRANSPORTATION, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF AMICUS CURIAE OF THE FEDERALIST SOCIETY, OHIO STATE UNIVERSITY COLLEGE OF LAW CHAPTER, IN SUPPORT OF PETITIONER ADARAND CONSTRUCTORS, INC.

Pursuant to Supreme Court Rule 37, the Ohio State University student chapter of the Federalist Society respectfully submits this brief amicus curiae in support of petitioner Adarand Constructors, Inc.. Written consent to the filing of this brief has been granted by counsel for all parties. Copies of the letters of consent have been lodged with the Clerk of this Court.

INTEREST OF AMICUS

The Federalist Society at the College of Law of The Ohio State University is a student chapter of The Federalist Society. The Federalist Society is a national organization comprised of members of the legal community who regard themselves as philosophically conservative or libertarian and who are dedicated to

preserving the rule of law. On the basis of personal experience, the membership of the Ohio State University Chapter (which chapter includes women and members of minority groups and is typical of other student chapters) believes that preferences for women or minorities are socially divisive, even when adopted by a disinterested authority as a narrowly-tailored remedy for identified, purposeful discrimination. The membership anticipates that tensions between people of different races and sexes will grow at the national level of government. The membership fears, however, that structural factors unanticipated by James Madison in *The Federalist No. 10* render the national legislature susceptible to race and gender factional tyranny.

INTRODUCTION

The right to equal protection of the laws is a personal right. *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948). At the heart of this right lies the principle that government must treat citizens as individuals, not merely as "representatives" of a group. *See Metro Broadcasting, Inc. v. Federal Communications Commission*, 497 U.S. 547, 602 (1990) (O'Connor, J., dissenting) (citing other authority). To ensure respect for the individual, in a series of cases decided before *Metro Broadcasting* the Court subjected racial classifications to strict scrutiny regardless of the class of persons purported to benefit by the classifications. *Id.* at 603 (O'Connor, J., dissenting) (citing various

authorities).[1] In *Metro Broadcasting* the Court departed from this position. There the Court held that "benign" race-conscious measures could include measures unrelated to the compensation of discrimination victims. *Id.* at 564-65. The Court also held that any such "benign" measures would be upheld if specifically mandated by Congress and

[1] For similar reasons the Court has given an intermediate level of scrutiny to gender classifications. This level of scrutiny respects the possibility of relevant differences between the sexes but permits the Court to identify illegitimate classifications reflecting archaic stereotypes or overbroad generalizations. Amicus contends that affirmative action programs rarely exist because of real differences between the sexes. Therefore, for the same reasons that support the use of strict scrutiny with regard to racial classifications, Amicus believes that programs designed to advantage women by disadvantaging the men against whom they compete should be subject to strict scrutiny. This rule would accord with the moral imperative of equal protection. Legal preferences and impediments alike are anathema to the concept of equality before the law.

substantially related to the achievement of important governmental objectives. *Id.*

Amicus submits that *Metro Broadcasting* was incorrectly decided and that this case proves its error. This case involves government action to encourage intentional race and gender discrimination by a private party.[2]

[2] The court below found the actions of the prime contractor in this case to be unobjectionable. *See Adarand Constructors Inc. v. Pena*, 16 F.3d 1537, 1542 n.9 (10th Cir. 1994). It failed to note, however, that private "reverse" racial discrimination in the formation of contracts is forbidden by 42 U.S.C. § 1981. *See McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 295-96 (1976). So too is discriminatory contractual interference by third persons. *Faraca v. Clements*, 506 F.2d 956, 959 (5th Cir. 1975), *cert. denied*, 422 U.S. 1006 (1975). It is not clear that Congress ever authorized prime contractors to violate § 1981. Thus, this case presents an independent basis for finding an equal protection violation by respondent. The prime contractors are state actors because highway construction has traditionally been the exclusive prerogative of the

Amicus respectfully urges the Court to address both the race and gender discrimination issues in this case.[3] Joint consideration of the race and gender classifications shows that the

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government, which is a basis for finding state action. *See Jackson v. Metropolitan Edison Co.*, 419 U.S. 343, 353 (1974). Furthermore, the government dangled the financial carrot that encouraged the prime contractor to be an instrument of the Department of Transportation's goals. *Cf. Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982) (significant encouragement grounds for state action).

[3] In *Metro Broadcasting* the Court did not examine the constitutional difficulties attending a joint race- and gender- preference program. *See Metro Broadcasting*, 497 U.S. at 558 n.7. As a result, the case gives the erroneous impression that it involved the burdening of a "majority" group. The opposite was true in that case and is true here. Joint race and gender preference programs are aimed at a national minority-- a subgroup of white males. The gender preference appears to be properly before the Court in this case because the court below erroneously held that petitioner lacked standing to challenge the gender preference. *See infra* note 9 and accompanying text.

challenged program discriminates against white males, a national minority.[4] That two courts below readily accepted this discrimination in reliance on *Metro Broadcasting* demonstrates how easily *Metro Broadcasting* can sanction legislative "retribution" against members of a currently unfashionable minority. *Cf. Korematsu v United States*, 323 U.S. 214, 240 (1944) (Murphy, J., dissenting) (treatment of individual on basis of race opens door to discriminatory actions against other minority groups "in the passions of tomorrow"). Magnanimous as were the framers of the Fourteenth Amendment, it is doubtful that they

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[4] In 1991 there were 92,399,000 white males in the United States. At the same time there were some 159,778,000 other persons in the United States. *U.S. Department of Commerce, Statistical Abstract of the United States 1993*, 22 (1993).

created that amendment to sanction unfavorable treatment of a national minority group such as white males.

Amicus respectfully requests the Court to reconsider and overrule *Metro Broadcasting*. Such decision would be appropriate because *Metro Broadcasting* wrongly deviated from this Court's equal protection jurisprudence. Furthermore, it was decided only recently and is not the type of decision upon which ordinary people have placed reliance. Therefore, the doctrine of *stare decisis* should pose no obstacle to overruling *Metro Broadcasting*. There are no settled expectations to be disrupted.

STATEMENT OF THE CASE

Mountain Gravel & Construction, a prime contractor, sought bids from subcontractors to complete a construction project awarded to it by the Department of Transportation. *Adarand Constructors, Inc. v. Pena*, 16 F.3d 1537, 1541-42 (10th Cir. 1994). Petitioner Adarand Constructors submitted the lowest bid. *Id.* at 1542. Instead of doing business with Adarand, however, Mountain Gravel awarded the subcontract to a "disadvantaged business enterprise" (DBE)[5] that had submitted a higher bid.

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[5] For purposes of this case a subcontractor qualifies as a DBE if it qualifies as a DBE under Section 106(c) of the Surface Transportation and Uniform Relocation Assistance Act of 1987, Pub. L. No. 100-17, 101 Stat. 132 (1987) (STURAA). *See Adarand Constructors, Inc. v. Pena*, 16 F.3d 1537, 1540-41 (10th Cir. 1994). The regulations implementing the STURAA affirmative action program focus on the racial, sexual, and "reverse glass ceiling" structure of small business

Id. at 1542.[6] From all appearances this decision to discriminate on the basis of status was motivated by bounty-- the opportunity to earn $10,000 from the Department of Transportation. *See id.*

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concerns. They create a presumption of disadvantage that operates in favor of minorities and women but against white males. *See* 49 C.F.R. §§ 23.61, 23.62 (1994). Although rebuttable, this presumption is discriminatory on its face. *See Milwaukee County Pavers Ass'n v. Fiedler*, 922 F.2d 419, 421-22 (7th Cir. 1991) (Posner, J.), *cert. denied*, 500 U.S. 954 (1991). *Accord, O'Donnell Construction Co. v. District of Columbia*, 815 F. Supp. 473, 482 (D. D.C. 1992). In practice this presumption may well be decisive.

[6] The principals of Adarand Constructors appear to be both women and men. *See Adarand Constructors, Inc. v. Skinner*, 790 F. Supp. 240, 241 n.1 (D. Colo. 1992), *aff'd, Adarand Constructors, Inc. v. Pena*, 16 F.3d 1537 (10th Cir. 1994). From what can be gathered from the published opinion, the men and women of Adarand Constructors seem to fall outside of the DBE category because they have not arranged their business relationships in such a way as to take advantage of the Department of Transportation regulations.

This amount could be earned under the Subcontractor Compensation Clause (SCC) program adopted within the Department as a device for meeting Department "goals" for participation of DBEs in federal contracts. *See id.*[7] Under the SCC program the government pays private persons to do business with DBE subcontractors rather than nonDBE subcontractors.[8]

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[7] The Small Business Act requires federal agencies to set an annual "goal" for DBE participation that presents the "maximum practicable opportunity for . . . small business concerns owned and controlled by socially and economically disadvantaged individuals to participate in the performance of contracts let by such agency." *See* 15 U.S.C.A. § 644(g)(1) (1994).

[8] Under the SCC program . . . [p]rime contractors whose DBE subcontracts exceed 10% of the overall contract amount are eligible for incentive payments of up to 1.5% of the original

As is evident from the facts, the SCC program operates like a random set-aside to keep "white male enterprises" (undoubtedly the classification of most nonDBEs) from participating on projects. The difference between the SCC program and a traditional "sheltered market" set-aside is that white male enterprises are permitted the dignity of competing for the relevant contracts. It is only if they demonstrate that they are the best in the competition that they are randomly subject to retroactive disqualification on the basis of race and gender. Thus, the program is arbitrary in two respects. First, it sanctions random disqualification. Second, it sanctions

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contract amount for utilization of one DBE, or up to 2% for hiring two or more DBEs.

Adarand Constructors, Inc. v. Pena, 16 F.3d 1537, 1540 (10th Cir. 1994).

disqualification on the irrelevant grounds of race and gender.

Petitioner sought, but was denied, injunctive and declaratory relief from the SCC program. *See Adarand Constructors, Inc. v. Skinner*, 790 F. Supp. 240, 245 (D. Colo. 1992). The United States Court of Appeals for the Tenth Circuit affirmed that decision. *See Adarand Constructors, Inc. v. Pena*, 16 F.3d 1537, 1547 (10th Cir. 1994). In doing so, that court refused to pass judgment on the issue of gender discrimination. Petitioner Adarand, the court reasoned, had failed to present evidence that the gender preference element of the DBE program had prevented it from bidding for federal subcontracts on an equal basis. *See id.* at 1543 (10th Cir. 1994) (citing *Northeast Florida Chapter of the Associated General*

Contractors of America v. City of Jacksonville, __ U.S. __, 113 S. Ct. 2297, 2303 (1993)).[9]

SUMMARY OF ARGUMENT

Equal protection principles confer rights to individuals, not groups. To protect those rights the Court has

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[9] This ruling seems erroneous. The SCC program can only work by subjecting white male subcontractors to a systematic, government-erected price disadvantage in their dealings with prime contractors. The heart of the program is a government payment to the prime contractor for hiring DBEs over nonDBEs. Absent this payment, the DBE's bid would typically be economically unattractive to the prime contractor. The purpose and effect of the payment is, at a minimum, to cover the prime contractor's extra costs of doing business with uncompetitive DBEs. That is, the program artificially lowers DBE bids *regardless of whether the DBEs are women-owned business enterprises or minority-owned business enterprises*. Therefore, a bidder like Adarand should have standing. The "injury in fact," the inability to compete on equal footing with DBEs bidding on the same contract, is established by the SCC program itself.

traditionally given searching scrutiny to legislation that bears the marks of crude majoritarianism or thoughtless stereotyping. The Court uncharacteristically lessened its equal protection vigilance, however, in *Metro Broadcasting*. That decision should be overruled. It poses a grave threat to the rights of individuals.

There is good reason to overrule *Metro Broadcasting*. First, the decision lacked sound doctrinal support. Second, the national legislature is susceptible to factional tyranny when faction is organized along lines of race and gender. Third, there is reason to believe that some justices in the *Metro Broadcasting* majority might reconsider their positions in light of developing demographic and political trends.

ARGUMENT

I. STRICT SCRUTINY IS THE PROPER STANDARD FOR DETERMINING THE CONSTITUTIONALITY OF RACE OR GENDER-BASED AFFIRMATIVE ACTION PROGRAMS ADOPTED BY CONGRESS.

A. *Metro Broadcasting* Should Be Overruled.

1. *Metro Broadcasting* Provided No Judicially Manageable Standards for "Benevolence."

Some members of this Court have questioned the existence of "benign" racial classifications. *See, e.g., Metro Broadcasting*, 497 U.S. at 609 (O'Connor, J., dissenting) (contradiction in terms); *Regents of the University of California v. Bakke*, 438 U.S. 265, 294 n.34 (Opinion of Powell, J.) (not innocuous). Others have been confident about the existence of such classifications. *See, e.g., Metro Broadcasting*, 497 U.S. at 564 n.12 (Brennan, J., contending that "examination of the legislative scheme

and its history" will reveal "benign" classifications).[10] Until *Metro Broadcasting*, however, the notion of "benevolence" was essentially confined to a remedial context. As a consequence, threats of majoritarianism and disrespect for the rule of law were minimized.

In *Metro Broadcasting* the Court removed the hinges from a Pandora's box by severing the link between remedy and benevolence. By severing this link the Court abandoned the closest thing it had to a standard for "benevolence." As a result, the judiciary is bereft of standards; "[u]ntethered to narrowly confined remedial notions, 'benign'

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[10] This approach is questionable. Even if it had no other defects, it invites legislatures to enact legislation that will work great harm on certain classes of individuals until the legislation is successfully challenged in the courts.

carries with it no independent meaning, but reflects only acceptance of the current generation's conclusion that a politically acceptable burden, imposed on particular citizens on the basis of race, is reasonable." *Metro Broadcasting*, 497 U.S. at 609-10 (O'Connor, J., dissenting).

2. Re-Linking "Benevolence" to "Remedy" Will Not Solve the Problem.

The ease with which the *Metro Broadcasting* majority cast aside a critical antimajoritarian limitation is disturbing. But it would be no less disturbing if the Court were merely to reinstate that limitation, for the probability that remedial classifications are "benevolent" is falling rapidly. The political power of women and minorities has grown dramatically since the notion

of "benign discrimination" first entered the law. As it continues to grow, it becomes increasingly untenable to view even "remedial" statutes (especially those allegedly designed to remedy wide-scale discrimination) as untainted by the bias of race or gender politics. In other words, it is extremely difficult to tell whether legislation is truly remedial.

It is crucial to realize that our Nation is not one of black and white, but one of divergent communities. *Metro Broadcasting*, 497 U.S. at 610 (O'Connor, J., dissenting). As various groups have joined the list of "beneficiaries" of affirmative action programs, one group has been conspicuously excluded from that list-- white males. White males, however, are a shrinking minority of the

population.[11] And as the political power of women and minorities has increased,[12] that of white males has

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[11] In 1991 there were approximately 92,399,000 white males in this country and approximately 159,778,000 persons in other groups. *U.S. Department of Commerce, Statistical Abstract of the United States 1993*, 22 (1993). The percentage of white males in this country is declining as the percentage of persons in other groups increases. *See id.* at 25. Members of the latter groups are not prohibited from voting because of their race (*see U.S. Const., amend. XV*) or sex (*see U.S. Const., amend. XIX*).

[12] In 1989, there were two women in the Senate and 25 in the House of Representatives. Roger H. Davidson & Walter J. Oleszek, *Congress and Its Members* (3d. ed. 1989). After the 1992 election, however, women comprised 11% of the House and 7% of the Senate. *See* Rick Wartzman, *Power of the Purse: Women are Becoming Big Spenders in Politics and on Social Causes*, *Wall. St. J.*, Oct. 17, 1994, at A1, A5. Between 1870 and 1970, only some 34 African Americans had served in the Congress. *See generally* Maurine Christopher, *America's Black Congressmen* (1971). As this brief is written, however, the number of African Americans contemporaneously holding seats in Congress exceeds that number. *See, e.g.*, Frank McCoy, *Can the Black Caucus Be Bipartisan?*, Black Enterprise, Jan. 1994,

waned. Even those who believe in "group rights" must concede that, if it has not already happened, at some time affirmative action programs that disadvantage white males must represent legislation whereby politically dominant groups benefit at the expense of a politically weaker white male minority group.

As an empirical matter, at the national level of government the tide may already have turned. The political power of women and minorities cannot be accurately gauged by counting heads in Congress. Women and minorities bring pressure to bear on white male politicians in many ways.[13] Women and

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at 22 (Caucus has 38 members).

[13] Women are dramatically increasing their political activism and giving, for example. *See* Rick Wartzman, *Power of the Purse: Women are Becoming Big Spenders in*

minority politicians, separately or together, can themselves wield power.[14] The Congressional Black Caucus, for example, has members who by reason of

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Politics and on Social Causes, Wall. St. J., Oct. 17, 1994, at A1, A5. And as long ago as the early 1970s it was apparent that women were casting more ballots than men. *See* Marjorie Lansing, *The American Woman: Voter and Activist in Women in Politics* 5 (Jane S. Jaquette ed., 1974) ("Demographically, it is clear that women will continue to be a majority of the voting age population for some time. Therefore, any tendency for them to vote as a cohesive bloc has implications. . . .").

[14] For a variety of what might be termed "economic" reasons, small groups in an organization like Congress can be disproportionately effective. *See generally* Mancur Olson, The Logic of Collective Action (2nd ed. 1971). Indeed, groups representing the "interests" of the majority of legislators in a body such as Congress might never coalesce. *See generally id.* Thus, for example, there is no Congressional White Male Caucus. There is, however, a Congressional Black Caucus comprised of members who "typically see themselves as representing members of their race wherever they may live." Roger H. Davidson & Walter J. Oleszek, *Congress and Its Members* 119 (3d ed. 1990).

their seniority hold great power on committees.[15] As a cohesive bloc,[16] the Congressional Black Caucus wields power as a pivotal holdout group of legislators. *Cf. Brief Amici Curiae for the Congressional Black Caucus et al.*, at 1-2, *Metro Broadcasting v. Federal Communication Commission* (No. 89-453) (objective of original members "reaffirmed through the legislative and

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[15] *See, e.g.*, R.S. Dunham, *The New Face of Power: Urban and Black*, Bus. Week, Apr. 18, 1994, at 126. This source of power might decline if the Court upholds congressional term limit legislation. On the other hand, however, term limit legislation holds significant potential for removing many white male incumbents and increasing the demographic diversity of the Congress.

[16] Cohesion is apparently maintained by threat of banishment. *See, e.g.*, Frank McCoy, *Can the Black Caucus Be Bipartisan?*, Black Enterprise, Jan. 1994, at 22 (members of 38-member Congressional Black Caucus considered expulsion of Republican member holding differing views).

political successes of the Caucus").

The significance of these changes in the political landscape is that it is no longer defensible to be satisfied with discriminatory legislation, even when that legislation is accompanied by something more than a "mere recitation of a benign purpose." *Compare Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 (1975). Even narrowly-tailored enactments purporting to remedy identified discrimination presuppose legislative findings of discrimination. The objectivity of such findings, however, must be seriously questioned.[17] When

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[17] An aside regarding findings of racial discrimination: A recently published book finds that racism is not widespread in America but that "many otherwise unprejudiced white Americans draw the line at preferential treatment . . . ." *See Civil Rights and Wrongs*, The Economist, Nov. 27, 1993, at 97 (reviewing Paul Sniderman and Thomas Piazza, The Scar of Race (1993)). If minority advancement is impeded by prejudice, and if what members of minority groups perceive to be prejudice is a reflection of resentment attributable to preferences, then it would seem that the goal of minority advancement would best be served by eliminating preferences. Even advocates of preferences should concede that any means to an end can yield diminishing marginal returns.

the risk of self-interest is so great, the legislature loses its fact-finding competence. Consequently, the moral imperative of equal protection will not be satisfied unless federal affirmative action legislation is subject to the most exacting judicial scrutiny. Absent searching judicial inquiry into the justification for affirmative action measures, there is no way to determine which classifications are remedial and which are motivated by race or gender politics. Strict scrutiny must be used to "smoke out" illegitimate uses of classifications. *See City of Richmond v.*

J.A. Croson Co., 488 U.S. 469, 493 (Opinion of O'Connor, J.).

Strict scrutiny would also serve important structural goals. To ask whether exclusions may have overriding benefits for all social groups in particular circumstances places the antidiscrimination principle at the mercy of the vagaries of empirical conjecture and frees judges to enact their personal values into constitutional doctrine. *See* Richard Posner, *The* De Funis *Case and the Constitutionality of Preferential Treatment of Racial Minorities*, 1974 Sup. Ct. Rev. 1, 25-26. Giving strict scrutiny to classifications that disadvantage white males is a necessary step towards fulfilling the ideals of equal protection.

3. *Metro Broadcasting* Lacked Substantial Foundation in Law and "Social Reality."

a. *Fullilove* Provided No Support for *Metro Broadcasting*

The *Metro Broadcasting* decision relied heavily on *Fullilove v. Klutznick*, 448 U.S. 448 (1980). *See, e.g., Metro Broadcasting v. Federal Communications Commission*, 497 U.S. 547, 564-5 (1990). *Fullilove*, in turn, had placed great weight on the "institutional competence" of Congress. *See id.* at 563 (citing *Fullilove*, 448 U.S. at 490). But the "institutional competence" discussed in *Fullilove* was predicated on the authority of Congress to enact legislation to enforce the Fourteenth Amendment. *See, e.g., Fullilove*, 448 U.S. at 483 (Opinion of Burger, C.J.). That authority, which derives from section five of the

amendment, authorizes Congress to enforce "by appropriate legislation" the amendment's dictate that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." *See U.S. Const., amend. XIV*. Although frequently described as a "remedial power," the words of this grant contemplate no more than prophylactic, neutral legislation to safeguard rights belonging to all persons. *Cf. City of Richmond v. J.A. Croson Co*, 488 U.S. 469, 518 (1989) (Kennedy, J., concurring) ("The process by which a law that is an equal protection violation when enacted by a State becomes transformed to an equal protection guarantee when enacted by Congress poses a difficult proposition. . . ."). But regardless of the scope of the section five powers, by its terms the section five authority has

no application to cases which do not involve States. Therefore *Fullilove* could not possibly have supported the *Metro Broadcasting* decision.

A more important observation is that congressional competence remains an open question even when States are involved. *See, e.g., Fullilove*, 448 U.S. at 499 (Powell, J., concurring) (question for the Court whether Congress is competent to make findings of unlawful discrimination). And if that question is answered in the affirmative, it remains true that institutional competency has never been viewed as displacing the role of the Court in defending the Constitution. *See, e.g., id.* at 473 (Opinion of Burger, C.J.) (citing *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 103 (1973)). Thus, the *Metro*

Broadcasting majority could not properly have concluded that congressional affirmative action programs are subject to anything less than strict scrutiny. The Court has never abdicated its unique oversight role in this area of the law.

b. *Metro Broadcasting* Overlooked Abundant Precedent Holding the Federal Government to the Same Equal Protection Standards that Govern States

Equal protection analysis under the Fifth Amendment is the same as that under the Fourteenth Amendment. *See Fullilove*, 448 U.S. at 517 n.2 (Marshall, J., concurring) (citing *Buckley v. Valeo*, 424 U.S. 1, 93 (1976) (per curiam)); *see also Croson*, 488 U.S. at 634 (Kennedy, J., concurring). *Croson* held that *all* race classifications are tested under strict scrutiny. *City of Richmond v. J.A.*

Croson Co., 488 U.S. 469, 494 (plurality); *id.* at 520 (Scalia, J., concurring). *Metro Broadcasting*, however, ignored these precedents. *See Metro Broadcasting*, 497 U.S. at 603 (O'Connor, J., dissenting) (Court's application of lessened equal protection standard to congressional actions without support in cases or Constitution); *id.* at 634 (Kennedy, J., dissenting) (many precedents effectively overruled by majority's opinion). Therefore, *Metro Broadcasting*'s departure from these standards was unwarranted by law. It was also unwarranted by "social reality."

c. *Metro Broadcasting*'s National-Local Dichotomy Is a Dangerous Misunderstanding of Madisonian Theory

The *Metro Broadcasting* majority suggested that Congress is a body that "stands above factional politics." *Metro Broadcasting*, 497 U.S. at 566. *Compare City of Richmond v. J.A. Croson, Co.*, 488 U.S. 469, 522 (1989) (Scalia, J., concurring) (objectivity and flexibility "already to be doubted in a national legislature"). Nothing in "social reality" supports the suggestion that Congress stands above factional politics. In fact, that suggestion misunderstands the core of Madisonian interest group theory.

It is true that Madison believed the likelihood of oppression from faction to be greater in smaller political units than larger ones. His belief was

grounded in a logic similar to that present in the economist's model of perfect competition. Freedom from the tyranny of faction, he thought, like freedom from the evil of monopoly, would more likely be realized when factions in the (political) market were numerous and relatively small. With factions relatively small, none could be expected systematically to predominate. Because smaller political markets could be expected to contain fewer factions than the larger political market of a geographically expansive republic, the evil of faction would find more ready expression at the local level.[18] With

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[18] Madison wrote the following:

> [T]he smaller the society, the fewer probably will be the distinct parties and interests composing it; the fewer the distinct parties and interests, the more frequently will a majority be found of the same party [and] . . . the more

few "players," each would be relatively large in the sense of having the capacity to produce palpable effects on political outcomes. With relatively few factions, a single faction or a small set of factions would more likely emerge as a political monopolist.

The *Metro Broadcasting* majority seems to have overlooked the essence of Madisonian theory. The reason Madison supposed the national legislature to be an unlikely venue for oppressive faction was assumption that legislative competition at the national level would

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easily will they concert and execute their plan of oppression. Extend the sphere and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens. . . .

The Federalist No. 10, at 83 (James Madison) (Clinton Rossiter ed., 1961).

involve many small, distinctive interests. This assumption may have been valid when women and members of racial minority groups were prohibited from voting and politics was largely a matter of competing economic interests. It is not valid today, when faction is increasingly organized along the noneconomic dimensions of race and gender.

To be sure, it was not only just, but also efficient, to extend the voting franchise to women and racial minorities. Representative democracies do not function as such if they lack a mechanism for registering the preferences of a sizeable portion of the populace. But if members of Congress of any race or gender believe that it is their role to represent people of a certain race or gender rather than people of a certain

state or district, the system's immunity from the evil of factional tyranny is compromised. When faction is organized along the dimensions of race and gender the national legislature is susceptible to tyrannies of the majority because "extending the sphere" does not increase the number of genders or races. Factional organization along lines of race and gender has left this country with a competition between a limited number of players: men, women, whites and minorities. This limited competition yields the equivalent of an oligopolistic market -- an environment conducive to strategic behavior among market participants. Strategic behavior can manifest itself in many pernicious forms. For example, groups purporting to represent women and members of racial minority groups might combine to cause

legislators to prey upon members of the white male minority. The only way to prevent this sort of evil is to give full effect to the equal protection component of the Due Process Clause. "Extending the sphere" does not prevent tyranny of the majority when faction is reduced to race and gender.

4. Models Used By Members of the *Metro Broadcasting* Majority Counsel Adoption of Strict Scrutiny.

The concerns raised by a "social reality" unanticipated by Madison can be illustrated by reference to models which, although neither part of the Constitution nor necessarily valid, were sometimes invoked by members of the *Metro Broadcasting* majority. One model, for example, theorized about the likelihood of "benign" discrimination. Politically dominant groups, it assumed, are unlikely

to harm members of their own group.[19] This model, however, suggests that policies burdening white males should be given strict scrutiny. White males constitute a national minority and their political power, at least on the basis of numbers, is outweighed by that of women

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[19] *See* John H. Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. Chi. L. Rev. 723, 735-36 (1974) ("when the group that controls the decision making process classifies so as to advantage a minority and disadvantage itself, the reasons for being unusually suspicious, and, consequently, employing a stringent brand of review, are lacking."). This model can be criticized on a number of grounds, including its suggestion that equal protection rights belong to groups rather than individuals. Those who have relied upon the model in the past, however, must surely accept it implications for the present, *viz.*, that there *is* reason to distrust race and gender-conscious legislation when it disadvantages white males and white males are a demographic minority. *Cf. id.*, quoted in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 496 (Opinion of O'Connor, J.) ("of course it works both ways. . . .").

and minorities. The national legislature cannot be regarded as a competent judge of legislation containing classifications that disadvantage white males when the political decisionmakers, or *at least* the interests behind them, "benefit" from the enactment of the legislation.

Another model periodically invoked by members of the *Metro Broadcasting* majority counsels special judicial solicitude for "discrete and insular" outsider groups. This model derives from footnote four of *United States v. Carolene Products Co.*, 304 U.S. 144, 152, n.4 (1938). The "footnote four" model is not a doctrinal component of equal protection jurisprudence. *See, e.g., Kovacs v. Cooper*, 336 U.S. 77, 90-91 (1949) (Frankfurter, J., concurring); *Sugarman v. Dougall*, 413 U.S. 634, 655-57 (1973) (Rehnquist, J., dissenting). It

must be conceded, however, that several members of the *Metro Broadcasting* majority placed great credence in it. Without accepting footnote four, one can see its implications for this case. Combined minority and gender preferences obviously burden white males, a minority group defined by an (ordinarily) immutable trait. Yet this same class is the target of an increasingly hostile social discourse. The social discourse draws from the critical theory that flourishes in many universities, including state universities. It is fair to say that some of this theory, as actually written or as (allegedly) misinterpreted, can be reduced to a message of hatred directed at white males. *Compare Brown v. Board of Education*, 347 U.S. 483, 494 (1954) (state school practices directed against

self-esteem of different class of students). The footnote four model, then, recommends special judicial solicitude for the increasingly isolated class of white males. This conclusion follows directly from the footnote four model and the premise that a number of women and minority group males are demanding "payback" policies that disadvantage white male individuals on the theory that women and minority group members are victims of past and present white male oppression. One need not reach this conclusion by resort to public choice economic theory. *Cf., generally, Daniel A. Farber & Philip P. Frickey, Is* Carolene Products *Dead? Reflections on Affirmative Action and the Dynamics of Civil Rights Legislation*, 79 Cal. L. Rev. 686 (1991) (questioning suggestion that "footnote four" should be "flipped" to

provide protection for members of unorganized majority groups).

Justice Marshall might have agreed that legislation burdening white males is dangerous. He wrote that

> No single talisman can define those groups likely to be the target of classifications offensive to the Fourteenth Amendment [because] 'political powerlessness' . . . is neither necessary . . . nor sufficient. . . [and discreteness and insularity must] be viewed from a social and cultural perspective as well as a political one. . . . [b]ecause prejudice spawns prejudice.[20]

These "footnote four" considerations apply in isolated segments of the governmental structure, such as agencies

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[20] *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 471 n.24 (Marshall, J., dissenting). *See also Regents of the University of California v. Bakke*, 438 U.S. 265, 361 (1978) (Opinion of Brennan, White, Marshall, and Blackmun, JJ.) ("any statute must be stricken that . . . singles out those least well represented in the political process to bear the brunt of a benign program").

within the Department of Transportation. Four justices in the *Metro Broadcasting* majority maintained that judicial scrutiny of agency action should be especially rigorous when a decision raises footnote four considerations. *See Industrial Union Department, AFL-CIO v. American Petroleum Institute*, 448 U.S. 607, 695 n.9 (1980) (Marshall, J., dissenting).

5. Even When Race and Gender Preferences Are Not Combined, Illegitimate Majoritarian Forces May Be at Work.

There is no reason to be less vigilant when federal affirmative action legislation features only a race or gender preference. One cannot tell whether illegitimate majoritarian processes are at work by viewing legislation in isolation. Legislation

claimed to be "benign" may, when viewed with other pieces of legislation, reveal malignancy. Legislation that does not appear to trammel the interests of white males may, when bundled with other legislation, reveal a design to produce net benefits for women and minorities at the expense of white males.

If the legislative process is iterated (which it is), and if there are only a few "players" (as when faction is organized along lines of race and gender), there exists significant room for strategic behavior consciously designed to harm one of the other "players" (for example, white males). While it is possible that "tit for tat" behavior could eventually produce socially harmonious behavior amongst the

"players,"[21] the Fourteenth Amendment does not permit experimentation. It demands equal protection of the *laws*. To provide that protection, something akin to the "step transaction" doctrine of tax law[22] might be required to identify classifications designed to harm a minority group. Reviewing seemingly collateral legislation for strategic behavior, however, would be an arduous task for the judiciary. The better approach to defending equal protection

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[21] *See generally* Robert Axelrod, The Evolution of Cooperation (1984) (in repeated game with no definite ending point, "tit for tat" strategy leads to cooperation).

[22] There are several variations of the "step transaction" doctrine. *See, e.g., Stephen A. Lind et al., Fundamentals of Corporate Taxation* 500-502 (3d. ed. 1991). All recognize, however, that several discrete transactions viewed in combination may reveal an improper purpose that could not be detected by viewing the transactions in isolation.

rights would be to subject all nonneutral federal affirmative action programs to strict scrutiny.

6. *Stare Decisis* Does Not Prevent the Court from Overruling *Metro Broadcasting*.

The doctrine of *stare decisis* should not stand in the way of overruling *Metro Broadcasting*, which represents a deviation from the Court's understanding of equal protection principles. The doctrine of *stare decisis* is not absolute. *See Hertz v. Woodman*, 218 U.S. 205, 212 (1910). Furthermore, reliance on the doctrine is inappropriate when a case involves unworkable standards. *See Garcia v. San Antonio Metro Transit Authority*, 469 U.S. 528, 546 (1985). *Metro Broadcasting* uses an unworkable standard-- "benevolence."

Metro Broadcasting is not

longstanding and venerated precedent. Nor, as a test of acts of Congress, is it the sort of precedent upon which ordinary people have relied. No hardship would occur were *Metro Broadcasting* overruled. Therefore, Amicus respectfully urges the Court to overrule that case.

CONCLUSION

For the reasons given, Amicus urges the Court to reverse the judgment of the court of appeals, overrule *Metro Broadcasting*, and extend the application of strict scrutiny to gender classifications in federal legislation designed to advance women by disadvantaging the men against whom they compete.

DATED: November, 1994.

Respectfully submitted,

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No. 93-1841

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

ADARAND CONSTRUCTORS, INC.,

Petitioner,

v.

FEDERICO PENA, Secretary of Department of Transportation, *et al*,

Respondents.

On Writ of Certiorari To The United States Court of Appeals For the Tenth Circuit

MOTION OF L. S. LEE, INC., et al. FOR LEAVE TO FILE BRIEF AMICUS CURIAE OUT OF TIME

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MOTION OF L. S. LEE, INC., et al.
FOR LEAVE TO FILE BRIEF
AMICUS CURIAE OUT OF TIME

L. S. Lee, Inc., et al. filed a brief *amicus curiae* on behalf of Petitioner with service by mail on November 8, 1994, in accord with Rule 29.2 of the Rules of this Court. Counsel has been informed by the Clerk that the brief was late because the Court had entered an Order directing that service of

the brief of the Petitioner be made by 3:00 p.m. on November 8, 1994.

The brief *amicus curiae* was filed with consent of the parties. Counsel for the amici was not aware that service was to be made other than under Rule 29.2. Counsel regrets the error and apologizes for the inconvenience to the Court. The *amici* would appreciate the opportunity to present their suggestions to the Court. Accordingly, it is moved that leave be granted to file the brief out of time.

Respectfully submitted,

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For The Tenth Circuit

BRIEF *AMICUS CURIAE* OF NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE IN SUPPORT OF RESPONDENTS

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BRIEF *AMICUS CURIAE* OF NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICUS CURIAE*

Pursuant to Rule 37.3 of this Court, the National Association For The Advancement Of Colored People (NAACP) respectfully submits this brief *amicus curiae* in support of Respondents. Written consent to the filing of this brief has been granted by counsel for all parties. Copies

of the letters of consent have been lodged with the Clerk of the Court.

The NAACP is the oldest and largest civil rights organization in America, with over 500,000 members in some 1,800 branches throughout the country. The NAACP appears frequently in this Court representing the interests of blacks and other minorities and often files briefs *amicus curiae* in cases of special importance to Black Americans.

This case is of particular concern to the NAACP because it involves consideration of a statutory protection which Congress has extended to the minority construction industry. Over the years, the NAACP has expended a large proportion of its resources attempting to open the Nation's construction industry to black workers and contractors. We have filed suit against construction labor unions and contractors as well as public agencies dispensing funds for public construction projects where blacks and others were excluded from employment opportunities. We have persistently urged Congress and the executive branch to create programs which foster opportunities for minorities to compete fairly in the building construction industry.

The instant case raises a challenge to a statutory vehicle which holds substantial promise for facilitating the entry of blacks into the construction industry and to the very authority of Congress to enact such remedial legislation. If Petitioners were successful in this challenge, blacks and other minorities who wish to participate in the Nation's construction industry would be harmed.

Because this case raises questions of paramount significance to the public interest, we believe that our perspective will complement the brief of Respondents and assist the Court in the resolution of these issues.

SUMMARY OF ARGUMENT

We had thought the question before the Court, whether the Court should review *federal* minority set-aside programs under strict scrutiny or heightened scrutiny, to have been well-established. In *Fullilove v. Klutznick*, 448 U.S. 448 (1979), and more recently in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), and *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990), the Court has recognized that it must grant some measure of deference to Congress' policy choices in the exercise of its enumerated powers -- in particular, its powers under Section 5 of the Fourteenth Amendment. Furthermore, the Court has held that the constraints of the Equal Protection Clause on Congress itself are not the same constraints as the Clause demands of the states. Thus, heightened scrutiny is the appropriate standard of review for remedial statutes enacted by Congress.

In our view, whatever uncertainty concerning the proper standard of review existed prior to *Croson* and *Metro Broadcasting*, *see United States v. Paradise*, 480 U.S. 149, 166-67 n.17 (1987); *Sheet Metal Workers v. EEOC*, 478 U.S. 421, 480 (1986), has been resolved. But in any event, even were the Court to apply strict scrutiny, the question of the "formulas of analysis" employed by the Court may be irrelevant, as the socially and economically disadvantaged business enterprise preference program created under the Small Business Act "would survive judicial review under either 'test.'" *Fullilove*, 448 U.S. at 492 (opinion of Burger, C.J.); *see also Paradise*, 480 U.S. at 166-67 (opinion of Brennan, J.); *Sheet Metal Workers*, 478 U.S. at 480.

I. THE COURT'S PRIOR DECISIONS CORRECTLY ESTABLISH THAT FEDERAL MINORITY PREFERENCE PROGRAMS ARE SUBJECT TO HEIGHTENED SCRUTINY.

A. Congress has plenary authority to enact set-asides such as Section 502 of the Small Business Act, 15 U.S.C. § 644(g). It may claim its authority from "an amalgam of its specifically delegated powers." *Fullilove*, 448 U.S. at 473 (opinion of Burger, C.J.). Most prominent among these are the "broad remedial powers of Congress" (*id.* at 483) to "determin[e] whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment." *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966).

It is the special province of Congress "to enforce equal protection guarantees," a vested "competence and authority" shared with "no [other] organ of government, state or federal." *Fullilove*, 448 U.S. at 483. Thus, "Congress ... has a specific constitutional mandate to enforce the dictates of the Fourteenth Amendment." *Croson*, 488 U.S. at 490.

That Congress has been vested with the power to enforce Section 1 of the Fourteenth Amendment suggests that Congress enjoys powers in preference to the states. *See Croson*, 488 U.S. at 490-92. As the Seventh Circuit has recognized, "[t]he joint lesson of *Fullilove* and *Croson* is that the federal government can, by virtue of the enforcement clause of the Fourteenth Amendment, engage in affirmative action with a freer hand than states and municipalities can do." *Milwaukee County Pavers Ass'n v. Fielder*, 922 F.2d 414, 423-24 (7th Cir.) (Posner, J.), *cert. denied*, 500 U.S. 954 (1991).

Because of Congress' express power to enforce the Fourteenth Amendment, this Court should respect the policy choices made by Congress in the exercise of its discretion. *Metro Broadcasting*, 497 U.S. at 563. The federal courts

stand as sentinels to secure congressional compliance with the minimal guarantees of the Equal Protection Clause, but must recognize the equal, and perhaps even superior, claim of Congress to insist on state conduct beyond those minimal dictates. *Katzenbach*, 384 U.S. at 651 & n.10. Similarly, the Court should accord even greater latitude to congressional judgment of the need for federal remedial programs.

While in our view Congress may claim sufficient authority in Section 5 for the provision of the Small Business Act under review here, Congress need not rest its authority on Section 5 alone. The grant program is an exercise of Congress' authority under the Spending Clause, U.S. Const. art. I, § 8, cl. 1, and the Commerce Clause, U.S. Const. art. I, § 8. cl. 3. Under the Spending Clause Congress may "further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives." *Fullilove*, 448 U.S. at 474. Through its spending power, Congress may encourage what it may not compel, *South Dakota v. Dole*, 483 U.S. 203 (1987), and may discourage what it cannot outright forbid. *Harris v. McRae*, 448 U.S. 297 (1980). And through its commerce power, Congress might regulate directly "the practices of prime contractors on federally funded public works projects." *Fullilove*, 448 U.S. at 475 (*citing Katzenbach v. McClung*, 379 U.S. 294 (1964); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964)).

B. Because of the deference due Congress in the exercise of its enumerated powers, the Court has insisted that federal racial preference programs satisfy only heightened scrutiny. In *Fullilove*, this Court considered a provision of the Local Public Works Capital Development and Investment Act of 1976, as amended by the Public Works Employment Act of 1977, which required a ten percent Minority Business Enterprise (MBE) participation in local public works projects funded through federal grants.

The Court noted that the MBE requirement in the Public Works Act was part of the "ongoing efforts toward deliverance" of "equality of economic opportunity" by the Small Business Association. 448 U.S. at 463 (opinion of Burger, C.J.). Three members of the Court upheld the set-aside through "close examination" (*id.* at 472) and "careful judicial evaluation" (*id.* at 480) in order "to assure that any congressional program that employs racial or ethnic criteria to accomplish the objective of remedying the present effects of past discrimination is narrowly tailored to the achievement of that goal." *Ibid.* Those justices emphasized that the inquiry into *Congress'* powers was of "limited scope" (*ibid.*).

Three additional members of the Court made explicit their view that the exacting scrutiny with which the Court judged invidious discrimination was "inapposite to racial classifications that provide benefits to minorities for the purpose of remedying the present effects of past racial discrimination." 448 U.S. at 518 (Marshall, J., concurring in the judgment). Accordingly, "the proper inquiry is whether racial classifications designed to further remedial purposes serve important governmental objectives and are substantially related to achievement of those objectives." *Id.* at 519.

Any lingering doubts about the standard of review for congressional remedial efforts was put to rest in *Metro Broadcasting*. In that case the Court considered an equal protection challenge to the Federal Communications Commission's minority preference policy. A majority there stated unambiguously that "benign race-conscious measures mandated by Congress -- even if those measures are not 'remedial' in the sense of being designed to compensate victims of past governmental or societal discrimination -- are constitutionally permissible to the extent that they serve important governmental objectives within the power of Congress and are substantially related to achievement of those objectives." 497 U.S. at 564-65 (footnote omitted).

The Court made plain in *Metro Broadcasting* that it "appl[ied] that standard" recognized in *Fullilove*. *Id.* at 564. *See* "Joint Statement, Constitutional Scholars' Statement on Affirmative Action After *City of Richmond v. J.A. Croson Co.*," 98 Yale L.J. 1711 (1989).

Nothing in the Court's opinion in *Croson* is to the contrary. The majority in that case found that the Court's "treatment of an exercise of congressional power in *Fullilove*" was not dispositive of treatment afforded an exercise of municipal power. *Croson*, 488 U.S. at 491. While a plurality of the Court suggested, as had Justice Powell in *Fullilove* (448 U.S. at 507 (Powell, J., concurring); *see also Wygant v. Jackson Board of Education*, 476 U.S. 267, 273 (1986) (Powell, J., concurring); *Regents of the University of California v. Bakke*, 438 U.S. 265, 305 (1978) (Powell, J., concurring)) that strict scrutiny should govern all cases of racial discrimination (488 U.S. at 494 (opinion of O'Connor, J.); *see also id.* at 520 (Scalia, J., concurring in the judgment)), the plurality very carefully pointed out that the Court could not accord the City of Richmond the same level of deference as it had accorded Congress in *Fullilove*. As the plurality stated: "That Congress may identify and redress the effects of society-wide discrimination does not mean that, *a fortiori*, the States and their political subdivisions are free to decide that such remedies are appropriate. Section 1 of the Fourteenth Amendment is an explicit *constraint* on state power, and the States must undertake any remedial efforts in accordance with that provision." 488 U.S. at 490 (opinion of O'Connor, J.) (emphasis in original). Applying heightened scrutiny to federal remedial programs recognizes both that Congress has primary responsibility for remedial programs and that the Equal Protection Clause is expressly a constraint on the states.

C. That Congress should possess the authority to remedy broad-based societal discrimination is consistent with

the conceptual underpinnings of our structure of government, whose roots can be traced to the ideas of Locke and Hobbes. *See* G. Mace, *Locke, Hobbes, And The Federalist Papers*, 7-8 (1979). In their view, the natural equality which all people possess by right is inevitably disrupted by dynamics beyond their control. When free individuals agree to be bound by the laws of a government, it is with the understanding that the government will, among other things, act to remedy unjust inequalities. This necessarily entails the proposition that the government has the power to take measures sufficient to achieve that end. The pre-eminence accorded our national legislature -- in the sense of its duty to act for the general welfare -- identifies it as the body endowed with a unique and particular power to confront the problems of society as a whole. When Congress acts to remedy the evils of discrimination, it does so with an authority not present in statehouses or town halls. Accordingly, it is appropriate that Congress should be given greater deference than state and local governments in securing the guarantees of the Equal Protection Clause.

II. EVEN IF THE COURT WERE TO APPLY STRICT SCRUTINY, THE SMALL BUSINESS ACT DISADVANTAGED BUSINESS ENTERPRISE PREFERENCE IS NARROWLY TAILORED TO A COMPELLING GOVERNMENTAL INTEREST.

The compelling rationale for the MBE program in *Fullilove* -- what the plurality referred to as the "ongoing efforts directed toward deliverance of the century-old promise of equality of economic opportunity," 448 U.S. at 463 -- had its origins in the same section of the Small Business Act at issue here, Section 8(a), 15 U.S.C. § 637(a). *See Fullilove*, 448 U.S. at 463-64. That section authorizes the SBA, as "necessary or appropriate" to let subcontracts to "socially and economically disadvantaged small business

concerns." 15 U.S.C. § 637(a)(1)(B). *See also* 15 U.S.C. § 644(g). 15 U.S.C. § 637(d)(3)(A) further provides:

> It is the policy of the United States that small business concerns and small business concerns owned and controlled by socially and economically disadvantaged individuals shall have the maximum practicable opportunity to participate in the performance of contracts let by any Federal agency . . . .

The House Subcommittee on SBA Oversight and Minority Enterprise has explained the need for such authority:

> The effects of past inequities stemming from racial prejudice have not remained in the past. The Congress has recognized the reality that past discriminatory practices have, to some degree, adversely affected our present economic system.
>
> . . . .
>
> ... The presumption must be made that past discriminatory systems have resulted in present economic inequalities. In order to right this situation, the Congress has formulated certain remedial programs designed to uplift those socially or economically disadvantaged persons to a level where they may effectively participate in the business mainstream of our economy.

448 U.S. at 465-66 (*quoting* H.R. Rep. No. 468, 94th Cong, 1st Sess. 1-2 (1975)). In a subsequent report the House Committee on Small Business found:

> [W]e more often encounter a business system which is racially neutral on its face, but because of past overt social and economic discrimination is presently operating, in effect, to perpetuate these past inequities. Minorities, until recently,

> have not participated to any measurable extent, in our total business system generally, or in the construction industry, in particular.

Id. at 466 n.48 (*quoting* H.R. Rep. No. 1791, 95th Cong, 1st Sess. 182 (1977)).

Furthermore, the Small Business Act's DBE program is less restrictive, and therefore less coercive, than the MBE program at issue in *Fullilove*. The Public Works Employment Act required a ten percent set-aside for MBE's. *See* 448 U.S. at 454. By contrast the Department of Transportation, the federal contracting agency here, does not require contractors participating in the Federal Lands Highway Program (as was Adarand Constructors) to hire DBE's. Rather they are encouraged to do so through an additional incentive payment. DOT indirectly subsidizes the hiring of DBE's, payments which Congress could plainly authorize DOT to make directly to DBE's.

The DBE program is not overinclusive. As implemented by DOT, the DBE program does not rely on broad definitions or stereotypes of what constitutes a Disadvantaged Business Enterprise, but is narrowly tailored to the driving need described by Congress to "uplift ... socially or economically disadvantaged persons," including minorities. Congress defined a "socially and economically disadvantaged" small business as one of which at least 51 percent is owned by "socially and economically disadvantaged individuals includ[ing] Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities, *or any other individual found to be disadvantaged.*" 15 U.S.C. § 637(d)(3)(C) (emphasis added).

The DOT regulations implementing this section further define DBE's to make clear that those within this list "are presumed to be both socially and economically disadvantaged," but that "[t]his presumption is rebuttable."

49 C.F.R. Part 23, Subpart D, App. C. The regulations explain that "[t]his means that ... a third party may present evidence that the firm's owners are not truly socially and/or economically disadvantaged, even though they are members of one of the presumptive groups." The classification of a business as a DBE cannot be overinclusive for the simple reason that the presumption is always subject to challenge. The statute but provides for an inference of fact, not a presumption of law. *See NLRB v. Curtin Matheson*, 494 U.S. 775, 814-15 (1990) (Scalia, J., dissenting). In *Fullilove*, the plurality found it "significant" that the "administrative scheme [of MBE classification] provides for waiver and exemption," (448 U.S. at 487 (opinion of Burger, C.J.)), and the DBE scheme here provides for even greater flexibility.

For similar reasons the DBE classification is not underinclusive. The same DOT regulations provide that "[i]ndividuals who are not presumed to be socially and economically disadvantaged by virtue of membership in one of these groups may, nevertheless, be found to be socially and economically disadvantaged on a case-by-case basis." 49 C.F.R. Part 23, Subpart D, App. C. Social disadvantage must "stem from his or her color; national origin; gender; physical handicap; long-term residence in an environment isolated from the mainstream of American society; or other similar cause beyond the individual's control." The social disadvantage must be "chronic, longstanding, and substantial, not fleeting or insignificant" and should be linked to "impairment of business opportunities." *Ibid.*

All of these factors suggest that no one is presumptively excluded from participation in the DBE program on the basis of race, color or national origin, just as no one conclusively qualifies for the DBE program on the basis of race, color, or national origin. In this respect the DBE program is far *less* underinclusive than the MBE program upheld in *Fullilove*. *See* 448 U.S. at 485-86.

Finally, the DBE program implemented by DOT suffers from none of the flaws of the Richmond program in *Croson*. The DBE program is narrowly tailored to remedy the effects of prior discrimination as found by Congress. Like "the congressional scheme upheld in *Fullilove*," which "allowed for a waiver of the set-aside provision where an MBE's higher price was not attributable to the effects of past discrimination" (*Croson*, 488 U.S. at 508), the DBE program does not impose an absolute preference for persons based solely on their race or color. Unlike the Richmond scheme under which "a successful black, Hispanic, or Oriental entrepreneur from anywhere in the country enjoy[ed] an absolute preference over other citizens based solely on their race," (*id.* at 508), the DBE program is race-neutral. Although it plainly encourages minority participation in the DBE program by granting minorities the rebuttable presumption that they are socially and economically disadvantaged, Congress has carefully and adequately explained, as this Court concluded in *Fullilove*, the basis for that presumption of fact.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

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No. 93-1841

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

ADARAND CONSTRUCTORS, INC.,
Petitioner,
v.
FEDERICO PENA, SECRETARY OF TRANSPORTATION, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF AMICUS CURIAE OF MINORITY BUSINESS ENTERPRISE LEGAL DEFENSE AND EDUCATION FUND, INC., NATIONAL MINORITY SUPPLIER DEVELOPMENT COUNCIL, INC., NATIONAL BLACK CHAMBER OF COMMERCE, INC., NATIONAL ASSOCIATION OF MINORITY CONTRACTORS IN SUPPORT OF RESPONDENTS

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INTEREST OF THE AMICUS CURIAE

The Minority Business Enterprise Legal Defense and Education Fund, Inc. ("MBELDEF") is a nonprofit corporation founded in 1980 by former Maryland Congressman Parren J. Mitchell. The primary purpose of MBELDEF is to promote legally defensible minority business opportunity programs. MBELDEF is comprised of over 2,000 minority businesses nationwide, many of which, in their efforts to become successful commercial

enterprises, have benefited from federal, state, and local minority business opportunity programs. Additionally, MBELDEF has provided numerous state and local governments with legal guidance in the adoption of such programs and has participated in significant litigation concerning these programs.

The National Minority Supplier Development Council, Inc. ("NMSDC") is a nonprofit corporation founded in 1969 that seeks to provide minority business with access to purchasing opportunities in the public and private sectors. Currently, NMSDC has 46 regional offices and a national office that coordinates these efforts on a local and national level.

The National Black Chamber of Commerce, Inc. ("NBCC") is a nonprofit corporation, dedicated to the economic empowerment of African American communities through development of African American businesses, particularly manufacturing and construction. NBCC has 80 affiliated chapters throughout the nation.

The National Association of Minority Contractors ("NAMC") is a nonprofit corporation founded in 1969. During its 25 years of service, NAMC's goals have been to provide education and training to minority contractors, to promote the economic and legal interest of minority construction firms, and to bring equitable procurement and business opportunities to its membership.

These Amici Curiae have a significant interest in this Court's review of the substantial constitutional issues presented by this challenge to programs that benefit minority business enterprises.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

This case raises issues of great social and jurisprudential importance. Petitioner challenges the federal government's power to encourage the awarding of federal contracts to businesses owned by socially and economi-

[1] The parties have consented to the filing of this brief. Their letters of consent are on file with the Clerk of the Court.

cally disadvantaged persons. Specifically, petitioner argues that the equal protection component of the Fifth Amendment invalidates longstanding federal efforts to assist disadvantaged persons because these programs incorporate rebuttable evidentiary presumptions that members of particular racial and ethnic groups suffer such disadvantage. Even such limited, remedial consideration of race, petitioner urges, is generally forbidden to the federal government.

These important issues should not be addressed in this case. *First*, and quite remarkably, petitioner has never identified which set of federal statutes and regulations it is attacking. At least three *different* sets of federal laws grant contracting preferences to businesses owned by socially and economically disadvantaged persons and are incorporated into the contract clause at issue here. The record does not reveal which program is at issue, and any one of the three might have led to the challenged preference. These programs differ in important respects, and those differences may make a critical difference in the constitutional analysis. Furthermore, because of this confusion, the Court would either have to affirm or invalidate *all* the programs, whether or not they are placed at issue by the facts, thus rendering what may well be an advisory opinion.

Second, the record does not indicate whether a presumption based on race is even at issue. Businesses can qualify as disadvantaged without any reliance on a racial presumption. The record does not establish whether the subcontractor at issue qualified by virtue of a racial presumption or by direct proof of disadvantage. Resolution of the question presented might well result in an advisory opinion for this reason as well.

If this Court reaches the merits, the decision below should be affirmed. Strict equal protection scrutiny should not apply here. Congress has substantial leeway—more leeway than is afforded the States—to make limited use of racial considerations to remedy disadvantages result-

ing from race discrimination. The federal programs at issue do not grant preferences on the basis of race. They grant unobjectionable preferences on the basis of social and economic disadvantage: both minority and non-minority individuals may qualify for statutory preferences. Each program uses race as a basis for a rebuttable presumption of disadvantage, but where that presumption is questioned, each program also places minority applicants for disadvantaged status on equal footing with non-minority applicants by requiring the *same proof* of economic disadvantage from each. Moreover, the contract clause at issue does not obligate private contractors to employ socially and economically disadvantaged subcontractors. It merely provides compensation to those who choose to do so. Thus, racial considerations play a carefully confined role in the overall scheme, and pose none of the risks that have required the application of strict scrutiny in other contexts.

There is ample support for Congress' judgment that such programs remain necessary to combat social and economic disadvantage. These federal laws, like all others, come to the Court with a presumption of constitutionality, and the record before Congress provides substantial evidence from which Congress could reasonably conclude that the challenged preferences remain necessary. *See Fullilove v. Klutznick*, 448 U.S. 448 (1980). *Cf. Turner Broadcasting Systems, Inc. v. FCC*, 114 S. Ct. 2445 (1994). Furthermore, a plethora of studies conducted in the wake of *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), confirm the continuing pattern of discrimination at the state and local levels in all regions of the country—and thus reinforce the continuing need for contracting preferences for the socially and economically disadvantaged.

ARGUMENT

I. THE RECORD IN THIS CASE DOES NOT PROVIDE AN ADEQUATE BASIS FOR THIS COURT'S REVIEW.

Petitioner purports to challenge the use of racial preferences in the "Federal Construction Procurement Program." Petitioner's Brief ("Br.") at 5. No such "program" exists. The specific contract provision at issue in this case references at least three *different* federal regulatory schemes that provide preferences for subcontractors under three *different* sets of criteria that measure social and economic disadvantage. Petitioner never specifically identifies which regulatory scheme it is attacking, and the record does not establish which one applied here. Indeed, the record does not clearly establish that a *racial* preference is even at issue. Subcontractors may qualify for a statutory preference without any reliance on a racial presumption, and the record does not establish whether the subcontractor in this case did so.

A. The Record Does Not Establish Which Of At Least Three Different Federal Regulatory Programs Is At Issue.

The contract between the federal government and the prime contractor at issue contains a standard provision—the Subcontracting Compensation Clause ("SCC")—providing monetary compensation if the prime contractor awards subcontracts in excess of 10% of the prime contract amount to "small business concerns owned and controlled by socially and economically disadvantaged individuals." (J.A. 24-25).[2] Under the SCC, a sub-

[2] DOT's Federal Highway Administration ("FHWA") requires the use of the SCC in contracts for Construction of Roads and Bridges on Federal Highway Projects. *See* Defendants' Brief in Support of their Motion for Summary Judgment, Exhibit 1, at I-1 and I-24. The Central Federal Lands Highway Division ("CFLHD"), a regional office of FHWA, contracted with Mountain Gravel and Construction Company ("Mountain Gravel") for the federally funded construction of a stretch of highway in Colorado.

contractor may qualify as a Disadvantaged Business Enterprise ("SCC DBE") in at least four ways: [3]

> **(1) Section 8(d) SDB/MSB:** a "Small Disadvantaged Business" or "Minority Small Business" pursuant to the Small Business Act's Section 8(d) Minority Small Business Subcontracting Program, 15 U.S.C. § 637(d), and regulations set out at 13 C.F.R. Part 124, § 124.1 (portions, as noted, applying to Section 8(d) Subcontracting Program), and Subpart B, §§ 124.601-602, and the Federal Acquisition Regulations ("FAR"), which implement, *inter alia*, the Section 8(d) Program, 48 C.F.R. ("FAR") §§ 19.000-001 and §§ 19.702-703, when the business meets the standards for self-certification set forth therein ("Section 8(d) SDB/MSB"); [4] or
>
> **(2) STURAA DBE/MBE:** a "Disadvantaged Business Enterprise" or "Minority Business Enterprise" pursuant to the Department of Transportation's regulations governing recipients of DOT financial assistance, 49 C.F.R. § 23.5, the Surface Transportation and Uniform Relocation Assistance Act of 1987 ("STURAA") Pub. L. No. 100-17, § 106(c), 101 Stat. 132, 145, and STURAA's implementing regulations at 49 C.F.R. § 23.6 ("STURAA DBE/MBE"), when certified as such by a state or other recipient of DOT funds; or

[3] The SCC is found at Section 108 of that contract, and was applicable to Mountain Gravel's subcontracting.

[3] The SCC reads as follows:

> A DBE shall mean a small business concern owned and controlled by socially and economically disadvantaged individuals as defined under the FAR Contract Clause 52.219-8 entitled "Utilization of Small Business Concerns Owned and Controlled by Socially and Economically Disadvantaged Individuals" or a woman owned business as defined under FAR Contract Clause 52.219-13.
>
> A small business concern will be considered a DBE after it has been certified as such by the U.S. Small Business Administration or any State Highway Agency. Certification by other Government agencies, counties, or cities may be acceptable on an individual basis provided the Contracting Officer has determined the certifying agency has an acceptable and viable DBE certification program.

(J.A. at 24).

[4] The CFLHD is subject to the Section 8(d) Subcontracting Program, *see* 15 U.S.C. § 637(d)(2), and is therefore governed by the eligibility requirements of that provision and its implementing regulations in the FAR.

> **(3) Section 8(a) SDB/MSB:** a "Small Disadvantaged Business" or "Minority Small Business" pursuant to the Small Business Act's Section 8(a) program, 15 U.S.C. § 637(a), and Section 8(a)'s implementing regulations at 13 C.F.R. Part 124 ("Section 8(a) SDB/MSB"), when certified as such by the Small Business Administration; or
>
> **(4) Other:** a small disadvantaged business enterprise pursuant to the certification process of a government agency, county, or city, when the contracting officer has determined the acceptable and viable nature of the particular certification program.[5]

Gonzales Construction Company ("Gonzales") received a subcontract from Mountain Gravel for which Adarand Constructors ("Adarand") was the low bidder because Gonzales had SCC DBE status. But nothing in the record establishes how Gonzales qualified. In particular, it does not show whether Gonzales provided proof of certification by the SBA, a city, a county, a municipal authority, the State of Colorado, or some other state, or whether he qualified through participation in the general Section 8(d)

[5] Petitioner acknowledges that CFLHD at least accepts certification of disadvantaged status based on some of the differing standards of these several regulatory schemes. *See* Br. at 8 n.7. In fact, CFLHD has a statutory and contractual obligation to comply with Section 8(d), and it has a contractual obligation to allow certification under category (4) above. An additional difficulty exists, however, as to the applicability of Section 8(d). Although the contract permits and the statute requires its applicability, the record contains conflicting indications as to whether CFLHD in fact accepts self-certification under the SCC. It is our understanding that a contractor may qualify by way of 8(d), but the issue is not entirely clear in this case.

Subcontracting Program. Thus, it is unclear which—if any—of the three federal preference programs incorporated into the SCC is at issue here. Indeed, petitioner cites indiscriminately to conflicting regulations from different schemes.[6]

The federal preference programs are similar in important respects. In each, a small business must be at least 51% owned and controlled by socially and economically disadvantaged individuals.[7] The definitions of social and economic disadvantage are also similar:

> Socially disadvantaged individuals are those who have been subjected to racial or ethnic prejudice *or cultural bias* because of their identity as a member of a group without regard to their individual qualities.
>
> []Economically disadvantaged individuals are those socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged.[8]

The three federal programs also afford members of particular racial and ethnic groups some presumption of

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[6] *See, e.g.*, Br. at 21 n.17 (making unsubstantiated and inaccurate assertions about SBA's treatment of race-based presumptions in the Section 8(a) and Section 8(d) programs); *id.* at 23-24 & n.19 (citing FAR regulations correctly and Section 8(a) regulations incorrectly).

[7] *See* STURAA, Pub. L. No. 100-17, § 106(c), 101 Stat. 132, 145; 49 C.F.R. § 23.62 (implementing STURAA); 15 U.S.C. § 637(a)(4) (Section 8(a) of the Small Business Act); 15 U.S.C. § 637(d)(3)(C) (Section 8(d) of the Small Business Act); FAR §§ 19.001, 19.703(a)(1), and 52.219-8 (FAR regulations implementing Section 8(d)).

[8] 15 U.S.C. § 637(a)(4)(C)(5) and (6)(A) (emphasis added). *See* FAR § 19.001 (FAR regulations implementing Section 8d; STURAA, Pub. L. No. 100-17, § 106(c)(2)(B) (adopting Section 8(d) and FAR implementing regulations' definition).

disadvantage.[9] Alternatively, disadvantaged status may be granted "on a case-by-case basis, [to] individuals who are not members of [a named minority group]," 49 C.F.R. § 23.62, such as disabled Vietnam veterans, Appalachian white males, Hasidic Jews, or any other individuals who demonstrate that they are socially and economically disadvantaged. 49 C.F.R. Pt. 23, Subpt. D., App. A (analysis of § 23.62).[10] In each federal program, applicants whose presumptive status is questioned[11] must offer the same proof of economic disadvantage as applicants who are not members of named minority groups. *See, e.g.*, 49 C.F.R. § 23.69; FAR § 19.703(a)(2). In the ultimate determination of economic disadvantage, therefore, each of the three programs treats minority and nonminority applicants identically. *See* 13 C.F.R. § 124.106(a); 13 C.F.R. § 124.106(b); 49 C.F.R. Pt. 23, Subpt. D, App. C.

These federal programs differ, however, in three ways that may have a critical bearing on this Court's constitutional analysis: (1) the basis for individual identification as a member of a named minority group; (2) the scope of the presumption of disadvantaged status based on named minority group membership; and (3) the procedures available for challenging presumptions of disadvantaged status.

Section 8(d). The pertinent regulations for Section 8(d) eligibility are as follows:

---

[9] Groups may petition SBA to be certified and listed in the regulations as named minority groups. To prove that the group is socially disadvantaged, representatives must make an adequate showing that the group has suffered "chronic racial or ethnic prejudice or cultural bias." *See* 13 C.F.R. § 124.105(d); 49 C.F.R. Pt. 23, Subpt. D, Apps. A & C.

[10] *See also* 13 C.F.R. § 124.105(c); FAR § 19.703(a)(2) (citing 13 C.F.R. § 124.105(c)).

[11] That questioning may take the form of a third party challenge under STURAA or an investigation by SBA of 8(a) or 8(d) status. *See* 49 C.F.R. § 23.69(b)(1); 13 C.F.R. § 124.603(b); 13 C.F.R. § 124.111(c).

(1) *Identification*: Contractors may rely on written representations by a subcontractor regarding its status as a small disadvantaged business. 15 U.S.C. § 637(d)(3)(C) and (D); FAR §§ 19.000-001 and 19.703(a).

(2) *Presumption*: Contractors must presume that members of certain minority groups identified in the regulations ("named minority group(s)") are *both* socially *and* economically disadvantaged. 15 U.S.C. § 637(d)(3)(C) and (D); FAR §§ 19.000-001 and 19.703(a).

(3) *Challenges*: Although private parties may submit information to the federal contracting officer to try to persuade the officer to protest a subcontractor's Section 8(d) SDB/MSB status, a formal protest may only be initiated by the contracting officer or by the SBA. FAR § 19.703(a)(2); 13 C.F.R. § 124.603(b).

STURAA. The pertinent regulations for STURAA eligibility are as follows:

(1) *Identification*: The state must keep an annually-updated directory of certified businesses and make it available to bidders and proposers. 49 C.F.R. § 23.45(e).

(2) *Presumption*: A recipient must make a rebuttable presumption that members of named minority groups are *both* socially *and* economically disadvantaged for purposes of certifying businesses for STURAA DBE/MBE status. 49 C.F.R. § 23.62.[12]

[12] Despite the explicit statement by the statute and regulations that members of named minority groups must be presumed to be both socially and economically disadvantaged, STURAA, § 106(c)(2)(B) (relying on definition of socially and economically disadvantaged individuals in Section 8(d) of the Small Business Act and its regulations), 49 C.F.R. § 23.62 and App. A to Subpt. D, these regulations, at the same time, set forth a number of steps states must take in determining eligibility for STURAA DBE/MBE status. 49 C.F.R. § 23.45(f)(3). This litigation has failed to clarify whether these steps are to be applied only to those businesses that do not qualify for a presumption or whether the regulations are to some extent contradictory.

(3) *Challenges*: Any third party may challenge that presumptive status by submitting a challenge in writing to the state. 49 C.F.R. § 23.69(b)(1).

Section 8(a). The pertinent regulations for Section 8(a) eligibility are as follows:

(1) *Identification*: SBA makes a determination as to membership in a named minority group. *See* 13 C.F.R. § 124.105(b)(2).

(2) *Presumption*: The SBA may presume only that members of named minority groups are socially disadvantaged. 13 C.F.R. § 124.105(b). Even if presumed to be socially disadvantaged, an applicant for Section 8(a) eligibility must independently establish economically disadvantaged status. *See* 13 C.F.R. §§ 124.105(b) and 124.106.[13]

(3) *Challenges*: The SBA makes all determinations of eligibility. *See* 13 C.F.R. § 124.311(g). SBA will conduct a review of eligibility "upon receipt of specific and credible information" that a business no longer meets the requirements for economically disadvantaged status. 13 C.F.R. § 124.111(c).[14]

These differences in the three programs may be critical to this Court's constitutional analysis. A program that allows a self-certification of disadvantaged status poses different questions than a program that requires government certification. A presumption of both social *and* economic disadvantage may be more overinclusive than is a program that even initially requires proof of economic disadvantage. A program that allows any third party to

[13] In determining economic disadvantage, SBA makes a detailed assessment of factors in three categories: "The personal financial condition of the individual(s) claiming disadvantaged status, including that individual's access to credit and capital; the financial condition of the applicant concern; and the applicant concern's access to credit, capital and markets." 13 C.F.R. § 124.106(a)(2).

[14] Section 8(a) is further narrowed by a number of unique restrictions, *e.g.*, a small business concern's tenure in the Section 8(a) Program is subject to annual eligibility review and a fixed term of years. *See* 13 C.F.R. §§ 124.110, 124.111. Section 8(a) eligibility tenure is not open-ended.

challenge an individual's presumptive status may be more narrowly drawn than one that allows only the government to do so. The applicable constitutional analysis requires careful consideration of the way race is used, as well as whether the government's objectives could be met with more narrowly drawn regulations. Proper consideration of the questions presented thus requires careful attention to the precise structure of the challenged government program. *See infra* Point II.B.2.

B. The Deficiencies In The Record Preclude Review Of The Questions Presented.

Petitioner has not asked this Court to strike down a particular federal statute or regulatory scheme; it has asked the Court to invalidate the concept of racial preferences in contracting. Nothing in the record, including the opinion of the Court of Appeals, makes clear which of the different regulatory schemes discussed above is at issue in this case. The pleadings and the lower court decisions indiscriminately refer to the Federal Acquisition Regulations, regulations implementing STURAA and regulations implementing the Small Business Act, as if they contained identical regulatory schemes.

Having failed to identify the federal program specifically at issue, petitioner is effectively asking this Court to answer an abstract question about whether race may play a role in subcontracting decisions involving federal contract awards. But such a question should not—indeed cannot—be answered in the abstract. As demonstrated, differences in the various programs may be important to the Court's constitutional analysis, particularly with respect to the "narrow tailoring" inquiry. More fundamentally, because any one of the programs might be at issue, this Court can definitely resolve the case only by affirming or invalidating *all* the programs. That would necessarily result in an advisory opinion with respect to the programs that Gonzales did *not* use to qualify for the subcontract in issue. Even more fundamentally, the record does not indicate whether Gonzales qualified for disadvantaged status by virtue of a presumption, or

whether he proved disadvantage without benefit of a presumption.[15] Thus, it is unclear whether a racial presumption is even at issue.

This record plainly lacks the "reasonable clarity and definiteness" required for adjudication of a constitutional question of this importance. *Rescue Army v. Municipal Court of Los Angeles*, 331 U.S. 549, 568, 576 (1947); *see also California Bankers Ass'n v. Shultz*, 416 U.S. 21, 56 (1974). At the most basic level, there may be no case or controversy respecting the use of race. The record contains no finding or even allegation that Gonzales received the benefit of a race-based presumption in qualifying for the award at issue. Absent proof that a racial presumption is at issue, a ruling in this case would be advisory in nature. *See Flast v. Cohen*, 392 U.S. 83, 96 (1968). *See also Poe v. Ullman*, 367 U.S. 497, 501 (1961). Even if jurisdiction were technically present, review would be inappropriate because the record does not indicate which federal program is at issue, and this Court therefore lacks a concrete context for deciding the questions presented. Such prematurity and abstractness present " 'insuperable obstacles' to the exercise of th[is] Court's jurisdiction, even though that jurisdiction is technically present." *Socialist Labor Party v. Gilligan*, 406 U.S. 583, 588 (1972) (quoting *Rescue Army*, 331 U.S. at 574). This record simply does not "adequately present" the issues raised by petitioner. *McClanahan v. Morauer & Hartzell, Inc.*, 404 U.S. 16, 16 (1971).

For these reasons, the writ of certiorari should be dismissed as improvidently granted. *See Commonwealth of*

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[15] Our review of the record indicates that the entire factual basis of petitioner's claim that a racial presumption operated is contained in paragraphs 10 and 11 of the Declaration of Starr Profit, Mountain Gravel's Chief Estimator. *See* Plaintiff's Motion for Summary Judgment, Exhibit E, ¶¶ 10 and 11, *cited in*, Memorandum of Points and Authorities in Opposition to Defendants' Motion for Summary Judgment at 10. Those paragraphs contain a general assertion that Gonzales was a DBE. They do not identify the program under which he qualified. Nor do they indicate whether he qualified for that program by use of a race-based presumption as opposed to by presenting direct proof of disadvantage.

Massachusetts v. Painten, 389 U.S. 560, 561 (1968); *Williams v. Zuckert*, 371 U.S. 531, 533 (1963).

II. THE SUBCONTRACTING COMPENSATION CLAUSE AND THE REBUTTABLE PRESUMPTIONS COMPORT WITH THE REQUIREMENTS OF THE EQUAL PROTECTION COMPONENT OF THE FIFTH AMENDMENT.

A. This Court Should Apply Intermediate Scrutiny In Reviewing The Subcontracting Compensation Clause.

If this Court reaches the merits, it should decline petitioner's invitation to apply strict scrutiny to the challenged programs. For three reasons, the analysis set forth in *Croson*, 488 U.S. 469, has no application here.

First, the programs challenged here differ in critical respects from programs of the kind considered in *Croson*. In *Croson*, the Court held that a local minority set-aside program should be subjected to strict scrutiny because it employed a "rigid rule erecting race as the *sole* criterion in an aspect of public decisionmaking." 488 U.S. at 493 (emphasis added). *Cf. Shaw v. Reno*, 113 S. Ct. 2816 (1993). The federal programs incorporated into the SCC do not set aside government contracting opportunities for a group defined by race or ethnicity. Eligibility depends on social and economic disadvantage. The programs *exclude* individuals in racial and ethnic minority groups who cannot meet the criteria for disadvantage, and *include* individuals not in such groups if they can meet the criteria. To this extent, the programs at issue do not even raise a substantial constitutional issue. As Justice Scalia explained in his separate opinion in *Croson*,

> nothing prevents [government] from according a contracting preference to identified victims of discrimination. While most of the beneficiaries may be black, neither the beneficiaries nor those disadvantaged by the preference would be identified on the basis of their race.

488 U.S. at 526. *See also Fullilove*, 488 U.S. at 535 (Stevens, J., concurring).

To be sure, race is relevant in these federal programs. Although applicants who are not members of minority groups can qualify for contracting preferences without the presumption, an applicant's race may trigger a presumption of social and/or economic disadvantage. *See supra* Point I.A. Those presumptions, however, are rebuttable. Indeed, proof required for an ultimate determination of economic disadvantage is identical for both minority and non-minority applicants: where a minority applicant's presumptive status is questioned, he or she will be required to make the same showing of economic disadvantage as will a non-minority applicant. *See supra* Point I.A. Furthermore, the SCC does not require prime contractors to engage disadvantaged subcontractors, but merely provides additional compensation to those prime contractors who choose to do so.

Nothing in this Court's equal protection decisions requires the application of strict scrutiny to this limited use of race as a rebuttable presumption of disadvantage. In this critical respect, the federal programs under challenge here differ from those at issue in *Croson*, *Fullilove* and *Metro Broadcasting*—all of which granted preferences exclusively on the basis of race or ethnicity. *Fullilove*, 448 U.S. at 453-54; *Croson*, 488 U.S. at 713; *Metro Broadcasting Inc. v. FCC*, 497 U.S. 547, 557-58 (1990).

Second, where Congress has authorized the use of a race-conscious classification in a program designed to remedy the effects of racial and ethnic discrimination, this Court has applied intermediate scrutiny to assess the constitutional validity of agency rules implementing the details of that program. *See Metro Broadcasting*, 497 U.S. at 463, 565, 566.[16] Indeed, in *Metro Broadcasting*, this Court cited *Croson* as reaffirming "the lesson of *Fullilove* that race-conscious classifications adopted by Congress to address racial and ethnic discrimination are subject to

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[16] Congressional power to authorize such programs is rooted in the enforcement power of Section 5 of the Fourteenth Amendment and in Congress' Spending and Commerce Clause Powers. *See Fullilove*, 448 U.S. at 473-75.

a different standard than such classifications prescribed by state and local governments." *Id.* at 565.

Congress has instructed the President to adopt a government-wide goal for participation of socially and economically disadvantaged businesses in government contracting of *not less than* 5% of the total contracting for each fiscal year, and has instructed each federal agency to adopt goals to give those businesses the "maximum practicable opportunity" to participate in contracts and subcontracts let by the agency. 15 U.S.C. § 644(g)(1). As one means of helping it meet this statutory obligation, DOT's Federal Highway Administration ("FHWA") specifies the use of the SCC in contracts for Construction of Roads and Bridges on Federal Highway Projects. *See* Defendants' Brief in Support of their Motion for Summary Judgment, Exhibit 1, at I-1 and I-24. Intermediate scrutiny applies to this provision because "when a program employing a benign racial classification is adopted by an administrative agency at the explicit direction of Congress, [it is] 'bound to approach [its] task with appropriate deference to the Congress.'" *Metro Broadcasting*, 497 U.S. at 563.

Third, "Congress has considerable latitude, presenting special concerns for judicial review, when it exercises its 'unique remedial powers . . . under § 5 of the Fourteenth Amendment.'" *Metro Broadcasting*, 497 U.S. at 605 (O'Connor, J., dissenting). That power clearly operates where Congress requires the States to take measures to remedy past discrimination. *See id.* (citing *Fullilove*). If Gonzales obtained SCC DBE eligibility by virtue of its status as a STURAA DBE/MBE, then it is a State's action in certifying Gonzales pursuant to STURAA that is at issue. Through STURAA, Congress *requires* States to follow certain procedures in determining the eligibility of small businesses for preferences. STURAA, Pub. L. No. 100-17, § 106(c)(4), 101 Stat. 132, 146. This case is therefore indistinguishable from *Fullilove* insofar as it examines a presumption contained in STURAA and applied by a State. Moreover, Sections 8(a) and 8(d)

ameliorate the effects of past discrimination by state and local governments, *see infra* note 22 and accompanying text, thereby resting on Congress' Section 5 power to cure state and local violations of the Equal Protection Clause. Whether Congress chooses a federal or state agency as the instrument for administration of its remedial programs should not be dispositive of the applicable standard of scrutiny. Congress' Section 5 authority under the Fourteenth Amendment gives Congress unique power that is subject only to intermediate scrutiny.

B. Federal Contracting Programs For Socially And Economically Disadvantaged Individuals Satisfy Any Applicable Standard Of Equal Protection Review.

Petitioner's constitutional challenge should be rejected irrespective of what standard of review this Court applies. First, the compelling nature of Congress' purpose, *i.e.*, to remedy the effects of a pattern of discrimination in federal contracting, is evident from the legislative history of the Small Business Act and from nationwide disparity studies conducted in the wake of this Court's decision in *Croson*. Second, Congress' use of race is narrowly tailored to avoid the risk of stereotyping because it is neither underinclusive nor overinclusive: race is neither a necessary nor a sufficient condition for securing the preferred status. Moreover, legislative history and agency data establish a clear nexus between the chosen policy and the Congressional objectives.

1. *Congress had ample evidence upon which to base its findings of discrimination in government contracting.*

The SCC and the eligibility provisions incorporated therein are "justified as a remedy that serves the compelling governmental interest in eradicating the continuing effects of past discrimination identified by Congress." *Fullilove*, 448 U.S. at 496 (Powell, J., concurring). Because Congress has the authority to prohibit discriminatory practices and "prescribe remedies to eradicate their

continuing effects," *id.* at 502, the issue of whether Congress' asserted interest is compelling must focus on whether Congress has made sufficient findings to support its determination of discrimination. *Id.* In *Fullilove*, this Court examined the adequacy of Congress' findings of extensive discrimination against minority businesses in government contracting in reviewing the mandatory race-based preference that accompanied federal money designated for use in local public works projects. *Id.* at 453, 502. In that examination, the Court looked to the legislative history of the Small Business Act. *Id.* at 463-67, 502-06. Applying strict scrutiny, Justice Powell concluded that:

> A court must accept as established the conclusion that purposeful discrimination contributed significantly to the small percentage of federal contracting funds that minority business enterprises have received. . . . Although the discriminatory activities were not identified with the exactitude expected in judicial or administrative adjudication, it must be remembered that Congress may paint with a much broader brush than may this Court.

Fullilove, 448 U.S. at 506 (internal quotation omitted). As of 1977, then, this Court had determined that Congress "had abundant historical basis from which it could conclude that traditional procurement practices, when applied to minority businesses, could perpetuate the effects of prior discrimination." *Fullilove*, 448 U.S. at 478 (Burger, C.J.). This conclusion applies with even greater force to this case because the Small Business Act is directly at issue here.

Between 1977 and the 1978 and 1988 amendments to the Small Business Act that formed the current 15 U.S.C. § 644(g), Pub. L. No. 95-507 and Pub. L. No. 100-656, Congress continued to collect evidence of discrimination in federal contracting against disadvantaged and minority business. For example, in debates Senator Glenn pointed to a *Wall Street Journal* article reporting that "the country's 17% minority population controls 4% of

the nation's businesses, and these firms account for less than 1% of total business receipts." 124 CONG. REC. S29641-42 (1978) (debates regarding the amendment of the Small Business Investment Act and the Small Business Act) (statement of Sen. Glenn entering into the record David Gumpert, *Minority-Group Firms Get More Subcontracts Under Federal Projects*, WALL ST. J., Sept. 14, 1978, at 1 & 35).

Congress explicitly set forth a significant government purpose and articulated a need for the goals legislated in Section 644(g). During debates regarding the 1988 amendment of the Small Business Act which resulted in passage of Pub. L. No. 100-656, Congress acknowledged that the Section 8(a) programs had been successful in encouraging greater minority participation in government contracting. 134 CONG. REC. H10052 & H10069 (1988) (statements of Cong. Conte). For example, Congressman Conte reported that "[t]he value of financial packages approved for clients of [the Minority Business Development Administration] increased over 320% between 1983 and 1987" and that "[t]he number of contracts secured increased more than 350% from 1983 to 1987." 134 CONG. REC. H10068 (1988) (statement of Cong. Conte). However, Congressman Conte also pointed out existing disparities between availability and utilization in government contracting, even prior to this Court's decision in *Croson*. Conte told the Conference Committee that there were "more than enough small disadvantaged businesses available to help DOD fulfill its 5-percent goal without kiting the size standards. Parren Mitchell stated at our subcommittee hearing that there are enough minority businesses available to serve 20 percent of all government contracting." 133 CONG. REC. H10774 (1987). However, he noted that this availability had not been fully utilized by DOD in the past. *Id.*[17]

There is no evidence that the problem has been cured. On the contrary, Congress has continued to enhance the

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[17] Congress codified its findings in support of Pub. L. No. 100-656 at 15 U.S.C. § 631(f)(1).

8(a) program through scrutiny and reassessment.[18] As recently as November 29, 1994, Congress updated its record on the continuing effects of marketplace discrimination on small businesses owned by minorities and women.[19] On that date, the House Committee on Government Operations reported that "minorities have had fewer opportunities to develop business skills and attitudes, to obtain necessary resources, and to gain experience, which is necessary for the success of small businesses in a competitive environment. This lack of opportunity occurs primarily because of discriminatory or economic conditions." *Id.* at 5.[20]

Moreover, as a consequence of the *Croson* decision, a national body of evidence establishing the continuing need for preferences has developed.[21] Almost every major city

[18] This Court is not restricted to examining the legislative history of Section 644(g), rather, it "properly may examine the total contemporary record of congressional action dealing with the problems of racial discrimination against minority business enterprises." *Fullilove*, 448 U.S. at 503.

[19] *See Problems Facing Minority and Women-Owned Small Businesses, Including SBA Section 8(A) Firms, in Procuring U.S. Government Contracts: An Interim Report.* H.R. Rep. No. 870, 103d Congress, 2d Session at 5-8, 14-16.

[20] *See also id.* at 15 (noting that "there is underlying discrimination against new entrants into the construction field. This is because bonding firms owned by several generations of the same families seem to predominate; and such firms tend to give performance and payment bonds to people they already know and not to the new business person, especially if the small business owner is a woman or of a racial or ethnic minority.").

[21] Evidence similar to that compiled in these disparity studies, *see infra* note 22, was presented to Congress in the following hearings: *The Meaning and Significance for Minority Businesses of the Supreme Court Decision in the City of Richmond v. J. A. Croson Co.: Hearing before the Legislation and National Security Subcommittee of the Committee on Government Operations, House of Representatives*, 101st Cong., 2d Sess. (1990); *To Amend the Civil Rights Act of 1964: Permitting Minority Set-Asides: Hearing before the Committee on Governmental Affairs, United States Senate*, S. Hrg. 933, 101st Cong., 2d Sess. (1990); *City of Richmond*

in the nation has by now conducted a "*Croson* study."[22] These studies invariably find significant statistical disparities between minority business availability and utilization

v. J. A. Croson: Impact Response: Hearing before the Subcommittee on Urban and Minority-Owned Business Development of the Committee on Small Business, United States Senate, S. Hrg. 1280, 101st Cong., 2d Sess. (1990).

Testimony was presented at these hearings by minority business owners from diverse regions of the country in various categories of business including construction, goods, and services. Witness testimony uniformly reflected ongoing marketplace discrimination and heightened barriers and denial of market access as a direct result of the dismantling of affirmative action remedies in the wake of the *Croson* decision.

[22] *See, e.g.*, the following State, municipal, and county studies: National Economic Research Associates, Inc., The Utilization of Minority and Women-Owned Business Enterprises by Alameda County, Final Report (June 1992) [hereinafter Alameda Study]; Research & Evaluation Associates, Inc., Minority Business Disparity Study to Support City of Ashville Minority Business Plan, Final Report (October 29, 1993) [hereinafter Ashville Study]; Brimmer & Marshall, Public Policy & Promotion of Minority Economic Development, Parts I-VIII (June 29, 1990); Thomas D. Boston, PhD., Unequal Access: Minority Contracting and Procurement with the Atlanta Board of Education (August 8, 1991); Profs. Michael A. Millemann & Maxwell Chibandu, Public Comment Draft Report of the Task Force to Study the Constitutionality of the Baltimore City MBE and WBE Program (November 8, 1989); D.J. Miller & Associates, City of Charlotte MWBE Disparity Study (October 1933); The Blue Ribbon Panel (Susan Getzendanner, Ruben Castillo, and Milton Davis), Report on Minority Set-Asides in Chicago (March 29, 1990) [hereinafter Chicago Study]; Board of Education of the City of Chicago, Report Concerning Consideration and Adoption of the Revised Remedial Plan for Minority and Women Business Enterprise Economic Participation (January 30, 1991); Institute for Policy Research, University of Cincinnati, City of Cincinnati Croson Study (April 17, 1992); Minority Business Enterprise Legal Defense & Education Fund and BBC, Inc., Predicate Study: City of Columbus, Ohio (August 1992); Henderson Hyman & Howard Associates, The New Connecticut: Toward Equal Opportunity in State Contracting, Final Report (August 31, 1992); National Economic Research Associates, Inc., The Utilization of Minority and Women-Owned Business Enterprises by Contra Costa County, Final Report (May, 1992); Dade County Public School Board, Minority Business

in contracting, as well as particularized anecdotal evidence of discrimination, as required by *Croson*. 488 U.S.

Enterprises Utilization Study Recommendations and Administrative Responses (April 24, 1991); D.J. Miller & Associates, City of Dayton Disparity Study (March 1991); Harding & Ogborn, Browne, Bortz & Coddington, Inc., and Minority Business & Professional Directory, Inc., Denver Disparity Study: Construction & Professional Design Services, Final Report (June 22, 1990) [hereinafter Denver Study]; Minority Business Enterprise Legal Defense & Education Fund, Inc., An Examination of Marketplace Discrimination in Durham County, Preliminary Report (July 1, 1991); TEM Associates, Inc., State of Florida Minority/Women Business Study (December 1990); BBC, Inc., Disparity Study: City of Fort Worth (November 1993); North Carolina Institute of Minority Economic Development, City of Greensboro Minority and Women Business Enterprise Disparity Study (July 1992); National Economic Research Associates, Inc., The Utilization of Minority and Women-Owned Business Enterprises by the City of Hayward, Final Report (March 1993) [hereinafter Hayward Study]; D.J. Miller & Associates, Hillsborough County Disparity Study (1989); D.J. Miller & Associates, Inc., City of Jacksonville, Disparity Study (November 1990); BBC Research & Consulting and Minority Business Enterprise Legal Defense and Education Fund, Regional Economic Disparity Study, City of Las Vegas (July 1994); D.J. Miller & Associates, State of Louisiana Disparity Study (June 1991); Coopers & Lybrand, Ad Jackson Consultants, Inc., State of Maryland Minority Business Utilization Study, Final Report (March 15, 1990); Ad Jackson Consultants, Inc., Maryland-National Capital Park and Planning Commission, Minority, Female, Disabled Business Utilization Study, Final Report (November 4, 1992); National Economic Research Associates, Inc., Availability and Utilization of Minority and Women-Owned Business Enterprises at the Massachusetts Water Resources Authority, Final Report (November 21, 1990); MRD Consulting, A Minority and Women-Owned Business Discrimination Study Prepared for Metropolitan Dade County, Florida, Parts I-IV (November 29, 1993); Affirmative Action Consulting, Ltd. and Ralph G. Moore & Associates, M/WBE Disparity Study for the County of Milwaukee, City of Milwaukee and Milwaukee Public Schools (April 1992); Minnesota Department of Administration, Management Analysis Division, A Study of Discrimination Against Women- and Minority-owned Businesses (January 1990); Special Committee on Section 12½ Review, New Haven Board of Aldermen, Minority and Women Business Participation in the New Haven Construction Industry (May 23, 1990) [hereinafter New Haven Study]; BBC Research & Consulting, Pima County Disparity Study (June 1994); Xavier

at 492.[23] The thousands of specific anecdotes from minority and women entrepreneurs reflected in these dis-

University of Louisiana Economic Development Center, An Analysis, Critique and Chronicle of the Audobon Park Commission Minority Business Enterprise Plan for Construction of the Aquarium and Riverfront Park (October 1990); National Economic Research Associates, Inc., The Utilization of Minority and Woman-Owned Business Enterprises by the City of New York (January 24, 1992) [hereinafter New York City Study]; Division of Minority and Women's Business Development of the Department of Economic Development, Opportunity Denied! A Study of Racial and Sexual Discrimination Related to Government Contracting in New York State (Spring 1992); MGT of America, Inc. and Research and Evaluation Associates, Inc., State of North Carolina Study of Minority and Women Business Participation in Highway Construction (January 26, 1993); D.J. Miller & Associates, Disparity Study for the Orange County, Florida Consortium (February 24, 1993); BBC, Inc., Disparity Study: City of Phoenix (July 1993) [hereinafter Phoenix Study]; Minority Business Enterprise Legal Defense and Education Fund, Inc., An Examination of Prince George's County's Minority Business Program, Parts I-III (February 1991); Mason Tillman Associates, Sacramento Municipal Utility District M/WBE Disparity Study (October 1992); D.J. Miller & Associates, City of St. Petersburg Disparity Study (June 1990) [hereinafter St. Petersburg Study]; BPA Economics, Inc., Statistical Support for San Francisco's MBE/WBE/LBE Ordinance (May 1, 1989); BPA Economics, Mason Tillman Associates, and Boasberg & Norton, MBE/WBE Disparity Study for the City of San Jose, Final Report (1990); The Washington Consulting Group, Inc., Study of Minority/Women Business Participation in Purchasing and Concessions (July 9, 1990); National Economic Research Associates, Inc. and Portfolio Associates, Inc., The Utilization of Minority and Woman-Owned Business Enterprises by the Southeastern Pennsylvania Transportation Authority, Final Report (September 29, 1993); Knowledge Systems and Research, Inc., City of Syracuse Report on Local Public Works Contracting (January 1991); MGT of America, Inc., City of Tallahassee MBE Disparity Fact-Finding Study, Final Report (January 11, 1990); BBC Research & Consulting, The City of Tucson Disparity Study (June 3, 1994); National Economic Research Associates, Inc., Availability and Utilization of Minority and Women-Owned Business Enterprises at the Metropolitan Washington Airports Authority (February 14, 1990).

[23] In the rare case where no availability/utilization disparity was discovered, the authors attributed their findings to very low avail-

parity studies portray a serious pattern of discrimination across all regions of this nation and across all categories of industry. Manifestations of discrimination have typically included such forms as denials of opportunities to bid, unfair denials of contract awards, double standards in performance, unequal access to financing, and price discrimination by suppliers.

The disparity study commissioned by the City of Denver, Colorado is particularly comprehensive. *See* Denver Study, *supra* note 22. The Denver study examined all facets of the construction industry and analyzes disparities for each minority sought to be protected by the City's program. The study focused on the development and compilation of potential evidence of discrimination in the Denver construction and professional design industries. *Id.* at I-2 to I-4. Not only did the study find significant statistical disparities on projects where no MBE goals applied, it also found that minority construction firm availability was suppressed, given the number of minorities working in the industry. *Id.* at VI-4, VIII-2 and App. C. The study concluded:

> Overall, there is strong evidence of discrimination against MBEs and WBEs in the construction industry. . . .
>
> Evidence of discrimination was found for four groups within the minority construction and professional design industries. There was substantial evidence of discrimination against Hispanics, somewhat less evidence against Blacks and less against Asians and Native American Indians. . . . Because of the pervasiveness of racial discrimination, and because of the evidence of discrimination against each minority group, we conclude there exists race-based discrimination against all four minority groups in both construction and professional design.

Id. at VIII-8.

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ability of minority businesses, also caused by systemic discrimination. *See, e.g.*, St. Petersburg Study, *supra* note 22.

Similarly, a 1993 study in Ashville, North Carolina found evidence of discrimination in contracting and procurement activities. Ashville Study, *supra* note 22, at xix. During the eight years examined in construction contracting, white male-owned businesses received 99.1% of the $52,235,352.00 expended on construction contracts and subcontracts. *Id.* at xi. Moreover, the study concluded that utilization of African American firms averaged only 0.34% of construction dollars available, though African American firms constituted 2.28% of available construction firms. *Id.*

In Hayward, California, a 1993 study of contracting in that city found the following dollar utilization of MBEs as a percentage of availability for prime contracting: African Americans—2%; Asian Americans—7%; Hispanic Americans—8%; and Women—18%. Hayward Study, *supra* note 22, at Tbl. A, 1. The disparities in Phoenix, Arizona are similar. In 1987, the average black-owned firm received $55,195 in revenues by contracting with the Phoenix city government, while the average majority firm received $181,230. Phoenix Study, *supra* note 22, at VII-2. Census data from 1987 showed that minority businesses represented 5.80% of the market. However, in the period between 1987 and 1992, minority-owned businesses received only 1.91% of the City's purchase dollars, while majority-owned businesses received 96.25%. *Id.* at V-3.

A study in New Haven, Connecticut found a "long entrenched and widespread pattern of racial and gender discrimination in the construction industry in New Haven." New Haven Study, *supra* note 22, at 28. In 1987, blacks owned 6%, hispanics 0.5%, and women 3% of the construction firms in New Haven. However, based on Equal Employment Opportunities Commission Data for Connecticut showing percentages of construction employees in the State, in the absence of discriminatory barriers, blacks should own 10%, hispanics 5% and women 6% of the construction firms in the area. *Id.* at 19.

In New York City, a study calculating disparity ratios for each minority group that receives contracting preferences found that M/WBEs received a substantially smaller share of the dollars spent by New York City in 1989 and 1990 than would be expected given the availability of M/WBEs in the geographic market from which the City procures goods and services. New York City Study, *supra* note 22, at x. For example, African Americans received only 17 cents of every dollar they should have received based on their availability as prime contractors and only 68 cents of every dollar as subcontractors. *Id.* The study also found that discrimination is especially "virulent" in the construction industry, and that African Americans encounter the most frequent and severe discrimination. *Id.* at xi.

This significant and persuasive evidence of a national pattern or practice of discrimination in government contracting supports both the adoption and the continued use of the SCC and the federal programs incorporated therein. Congress perceived a compelling governmental interest and enacted legislation to remedy the systemic disadvantages experienced by minority business. The evidence available in the legislative history and subsequent empirical studies establishes that the need for federal action remains compelling. *See generally Turner Broadcasting System, Inc. v. FCC*, 114 S. Ct. at 2472 (acts of Congress must be upheld if justified by either "evidence on which Congress relied, or . . . additional evidence" validating Congress' judgment).

2. ***Congressional authorization of DOT's use of the SCC and of the federal programs incorporated therein is necessary to accomplish and narrowly tailored to further the compelling governmental interest.***

Narrow tailoring ensures "that the means chosen 'fit' [the] compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype." *Metro Broadcasting*, 497 U.S. at 617 (O'Connor, J., dissenting) (quoting *Croson*, 488 U.S. at 493). In *Metro Broadcasting*, Justice O'Connor expressed concern that the direct link drawn by the FCC between race and distinct viewpoints demonstrated that the means chosen to promote broadcast diversity were based on stereotyping. *Metro Broadcasting*, 497 U.S. at 617. In this case, however, race is neither a necessary nor a sufficient condition of securing the preference. *Id.* The SCC and the federal programs do not equate a particular race with disadvantage, but instead acknowledge that individuals of any race may experience prejudice or bias that may result in social and economic disadvantage.

The SCC and the federal programs' preference eligibility provisions are narrowly tailored. Disadvantage is the basis for classification: race does not serve as its proxy. *See Metro Broadcasting*, 497 U.S. at 621 (O'Connor, J., dissenting). Both minority and non-minority individuals may establish eligibility for the preference. Members of named minority groups have the benefit of a rebuttable presumption of disadvantage, but if that status is questioned, they are subject to the same requirements of proof of economic disadvantage as are non-named minority group members. *See supra* Point I.A. Non-disadvantaged and large minority businesses are excluded from this preference, and small disadvantaged non-minority businesses can receive its benefits.[24]

Although "the Government cannot employ race classifications that unduly burden individuals who are not members of the favored racial and ethnic groups," *Metro Broadcasting*, 497 U.S. at 630 (O'Connor, J., dissenting); 497 U.S. at 597-98, the burden suffered by non-minorities in this case is limited to the requirement that they prove their disadvantaged status without the benefit of the evidentiary presumption to that effect. No specialized market has been created and reserved for minority-owned businesses, and the opportunity to compete for subcontracts

[24] Adarand apparently never challenged the disadvantaged status of Gonzales.

falling within the SCC does not "depend[] entirely upon race or ethnicity." *Id.* at 630.[25] Even the scope of the market that has been targeted for the benefit of disadvantaged businesses is fluid: only goals, not quotas are to be set by DOT for participation of disadvantaged business in DOT contracting and subcontracting;[26] and only an *incentive payment* based on voluntary use of disadvantaged businesses by prime contractors is included in the SCC. *See* 497 U.S. at 630-31.

The Small Business Act sets a nationwide *goal* for disadvantaged business participation in federal contracting of "no less than 5%." 15 U.S.C. § 644(g). DOT is required to set goals for itself that present the "maximum practicable opportunity" for disadvantaged business participation in DOT contracting. *Id.* The figure that is operational in this case, however, is the 10% goal in the SCC: contractors may *choose* to use disadvantaged businesses for subcontracting in an amount of at least 10% of the total value of the contract in order to make themselves eligible for additional compensation.[27] A goal of

[25] If a market has been reserved for a class, it is a class of disadvantaged businesses. A classification of that nature only need survive this Court's rational basis scrutiny.

Even that market has not been reserved, however. It is not true that all dollars spent by the Federal government in fulfillment of federal contracting goals are restricted to race-based contractor recipients. Under SBA's Section 8(a) program, the Section 8(d) program, and STURAA, small disadvantaged businesses are permitted to subcontract or joint venture with nondisadvantaged firms, provided the disadvantaged business is not "fronting" for the nondisadvantaged firm. *See, e.g.*, 13 C.F.R. §§ 124.314, 124.321. Just as a firm such as Mountain Gravel awarded a subcontract to Gonzales, firms such as Gonzales subcontract to firms like Adarand. Disadvantaged business awards are not a closed fund in which nondisadvantaged businesses do not participate.

[26] *See* 15 U.S.C. § 644(g).

[27] The 12-15% goal for disadvantaged business participation that CFLHD set for itself to help DOT meet its overall goals is simply not operative in this case. It has no effect on the SCC: DOT's FHWA distributes the specifications for contracts relating to highway construction and CFLHD simply incorporates that specified provision in its contracts.

10% is reasonable and narrowly drawn. A 10% *set-aside* was upheld in *Fullilove* in part because it included a waiver provision that prevented rigid application of the set-aside in areas of the country where minority population might be low. 448 U.S. at 513-14.[28] The preference in this case is even more narrowly drawn because it is *not* a set-aside, but is, instead, a voluntary option that contractors may take or leave as they please.

Moreover, the nexus between the chosen policy and the asserted interest is demonstrated here by the direct relationship between preference programs for disadvantaged businesses and the level of utilization of those businesses. In addition to the legislative history and the *Croson* disparity studies, federal agency data suggests that disadvantaged business participation rates would have remained inequitably low in the absence of an 8(a) program. Statistics published by the Department of Defense show that dollars awarded to 8(a) businesses increased from $9 million in 1969 to nearly $2.8 billion in 1993. Department of Defense, *Small Disadvantaged Business (SDB) Program History*. From 1969 to 1993, the percentage of DOD total contracting dollars going to all SDBs has increased from 0% to 5.3%. *Id.* These statistics demonstrate the effectiveness of and continuing need for programs ot ameliorate the effects of past discrimination. Without them, those effects will continue to be felt.[29]

[28] The 10% figure is one that Congress has clearly considered appropriate as a goal for disadvantaged business participation in DOT projects. In STURAA, Congress legislated that figure as the goal recipients of DOT highway funds should meet. STURAA, Pub. L. No. 100-17, § 106(c)(1), 101 Stat. 132, 145.

[29] Indeed, as noted in at least one disparity study, absent such programs, disparity will remain: "African American owned MBEs received *none* of the 91 subcontracts issued by Alameda County prime contractors who had received awards during the period when the M/WBE program was suspended." Alameda Study, *supra* note 22, at ix-x. Although the use of the SCC is not explicitly

Finally, as Justice Powell noted in *Fullilove*, in enacting the preference at issue there and in the Small Business Act, Congress

> knew that other remedies had failed to ameliorate the effects of racial discrimination in the construction industry. Although the problem had been addressed by antidiscrimination legislation, executive action to remedy employment discrimination in the construction industry, and federal aid to minority businesses, the fact remained that minority contractors were receiving less than 1% of federal contracts.

Fullilove, 448 U.S. at 511 (citing 123 Cong. Rec. 7156 (1977) (remarks of Sen. Brooke)). For these reasons, the SCC and federal eligibility provisions incorporated therein are narrowly drawn so as to survive even this Court's strictest scrutiny.

CONCLUSION

For the reasons stated herein, this Court should either dismiss the writ of certiorari as improvidently granted or affirm the judgment of the Court of Appeals.

Respectfully submitted,

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limited in duration, the continuing need for these programs justifies their operation. STURAA is, of course, merely a fixed term appropriations statute, and the funding at issue in this case expired in 1991. *See* STURAA Pub. L. No. 100-17, § 106(a)(8). Section 8(a) eligibility is limited to a fixed term of years. *See supra* note 14.

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No. 93-1841

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

ADARAND CONSTRUCTORS, INC.,
Petitioner,

v.

FEDERICO PENA, *et al,*
Respondents.

On Writ of Certiorari To The United States Court of Appeals for the Tenth Circuit

BRIEF AMICUS CURIAE OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., IN SUPPORT OF RESPONDENTS

INTEREST OF AMICUS[1]

The NAACP Legal Defense and Educational Fund, Inc., is a non-profit corporation formed to assist African-Americans to secure their constitutional and civil rights by means of litigation. The Subcontracting Compensation Clause at issue in this case was adopted in part to

[1] Copies of letters from the parties consenting to the filing of this brief have been filed with the Clerk.

encourage federal contractors to subcontract with firms owned by African-Americans who have been the victims of racial discrimination. Amicus has previously filed briefs with this Court, on behalf of parties or amici, in a wide variety of cases involving race-conscious affirmative action. We believe our views on the circumstances presented by this case may be of assistance to the Court.

SUMMARY OF ARGUMENT

The petitioner in this case seeks only prospective injunctive relief with regard to certain possible future applications of the Subcontracting Compensation Clause. In order to establish standing to obtain such injunctive relief, petitioner must demonstrate that it faces reasonably certain and immediate injury if the injunction is denied. *Lujan v. Defenders of Wildlife*, 504 U.S. ___ (1992); *Los Angeles v. Lyons*, 461 U.S. 95 (1983); *O'Shea v. Littleton*, 414 U.S. 488 (1974). Petitioner faces no such imminent injury.

(1) Although the SCC has been in use since 1979, and petitioner has been in business since 1976, petitioner can point to only one contract which it allegedly ever lost because of the SCC.

(2) The SCC is utilized only in the relatively uncommon instances in which FHWA itself directly contracts for the construction of a highway. In 1990 the FHWA let in Colorado only one construction contract involving guardrail work, the particular work engaged in by petitioner.

(3) Not all such FHWA direct contracts contain an SCC.

(4) In some instances the SCC is of no practical importance because subcontracting with DBEs, which the

SCC merely encourages, is required by other contract provisions not challenged in this action.

(5) Petitioner can identify only six instances between 1976 and 1990 when it ever bid on any subcontracting work for an FHWA direct contract.

(6) Petitioner does not challenge all applications of the SCC. It raises no constitutional objection to the use of the SCC where the owners of a DBE are in fact disadvantaged, or where a firm qualified as a DBE solely because it was owned and managed by women. Petitioner challenges the constitutionality of the SCC only in those cases, if any, in which the SCC results in the award of a subcontract to a firm whose owners and managers are not disadvantaged, but qualified for DBE status solely because of the rebuttable presumption that minority owner operators of small firms were disadvantaged by past discrimination. Whether and when petitioner will be injured in the future by any such application of an SCC are too speculative to confer the requisite standing.

ARGUMENT

I. INTRODUCTION

Petitioner urges this Court to decide in this case fundamental constitutional issues of far-reaching importance regarding the ability of the Congress, and of federal executive agencies, to engage in any form of race-conscious action. Petitioner's brief sets forth an elaborately detailed formulation of constitutional principles which petitioner asks this Court to adopt. Noticeably absent from both the petition and that brief, however, is any account of how a decision by this Court on these complex issues would actually affect the petitioner itself.

In the proceedings below, the respondents directly challenged petitioner's standing to litigate the constitutional questions now presented to this Court.[2] The issue of standing must be addressed before the Court undertakes to consider the substantive constitutional questions raised by the briefs; in the absence of standing, this appeal would not present the "case or controversy" required by Article III, and the federal courts would lack subject matter jurisdiction. It is particularly important that standing problems be carefully assessed before resolving such substantive constitutional questions, since constitutional issues are to be decided on the merits only where clearly necessary.

Since the initial filing of the complaint in this action, both the litigation in the courts below and a substantial body of discovery have sharpened, clarified and ultimately limited the scope of petitioner's claim. In its current posture, petitioner's claim has been narrowed in three important respects.

First, although there are a variety of different federal programs regarding contracting and subcontracting, petitioner challenges only <u>one</u> -- the inclusion of Subcontract Compensation Clauses (SCC) in certain construction contracts executed by the Federal Highway Administration.[3] Petitioner is not here challenging set

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[2] Defendants' Motion for Summary Judgment, ¶2; Pet.App. 12-14.

[3] Petition for Writ of Certiorari, 1 ("On August 10, 1990, Adarand ... filed an action ... challenging the use ... of ... the 'Subcontracting Compensation Clause'"), 3 ("Adarand asserts that the SCC program ... violates the right of equal protection ..."); Pet.Br. 7 (SCC is "the ... mechanism that is at issue in this case"), 11 (action challenges "the constitutionality of the use ... of the contract provision referred to as the SCC.")

asides or other practices by state highway agencies engaged in federally assisted construction projects. As a practical matter, the vast majority of federal highway funds are disbursed to the states in the form of grants, and the states themselves in turn contract for the building of roads; these state contracts, although federally funded, do not include any SCC. Of all federal funds utilized for highway construction, only two percent are expended directly by the Federal Highway Administration, rather than being funnelled through the states.[4] Even among the limited number of federal highway contracts entered into directly by the FHWA, not all include an SCC.[5]

Second, petitioner does not object to <u>all</u> applications of the Subcontracting Compensation Clause. The SCC provides compensation for federal highway contractors who subcontract with Disadvantaged Business Enterprises (DBEs). Petitioner does not and could contend that a race-neutral policy of assisting socially and economically disadvantaged individuals raises any constitutional question. Petitioner thus does not attack the utilization of a SCC where the owners and managers of a DBE are white.

Petitioner's brief at a number of points obscures the nature of the issue by describing the case as "a challenge to a federal program, ... 'the Federal Construction Procurement Program,' authorized by §502 of the Small Business Act." Pet.Br. 5; see *id.* at 44-46, 49. Petitioner's conclusion urges the Court to declare the Federal Construction Procurement Program unconstitutional. *Id.* at 50. But the only specific action taken under that program to which petitioner objects is the SCC. *Id.* at 7.

[4] For each fiscal year from 1988 through 1992, federal highway construction spending totaled $7.35 billion. Expenditures by FHWA on forest highways, the type of construction involved in the West Dolores project, were only $55 million annually. 101 Stat. 144-45.

[5] See part III, *infra*.

Under the terms of the regulations incorporated in the SCC, moveover, any firm owned and managed by women is treated as a DBE,[6] whether the women are white or otherwise. The number of white women in the United States is of course substantially larger than the total number of racial minorities. Petitioner does not challenge the constitutionality of this gender-based criterion.[7] Petitioner's

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[6] The SCC provision of FHA contracts, section 108.01, states in pertinent part that "a DBE shall mean a small business owned and controlled by socially and economically disadvantaged individuals ... or a woman owned business as defined under FAR Contract Clause 52.219-13." Answer, Exhibit C, p. I-24; J.App. 24. The referenced provision of the FAR Contract states:

> " 'Woman-owned small business' ... means small business concerns that are at least 51 percent owned by women who are United States citizens and who also control and operate the business."

Answer, Exhibit B, p. F-16; 48 C.F.R. 52.219-13. The treatment of women-owned and operated firms under the SCC is thus significantly different than the treatment of minority owned and operated firms. All women-owned small business are classified as DBEs, whereas minority owners are only accorded a rebuttable presumption of disadvantage. J.App. 24.

Although petitioner systematically avoids expressly mentioning this provision, which applies to both white as well as minority women, it carefully states that there is no presumptive classification as a DBE for firms "owned or operated by white men." Pet.Br.9 (emphasis added).

[7] The questions presented by the petition all deal exclusively with the "race-based" aspect of the SCC. Petition, p.i; see also Pet.App. 14 ("Both parties ... proceeded before the district court on the apparently shared assumption that the instant controversy concerned only the racial preference aspect of the SCC program. Because Adarand never argued the point in its motion for summary judgment, the district court was never afforded an opportunity to evaluate the merits of the WBE .... Moreover, Adarand did not press this point during arguments before us .... For these reasons, we limit our review only to the constitutionality of the SCC program's

sole constitutional objection is to the fact that, in determining whether a male-owned or managed firm is disadvantaged by past discrimination, officials apply a rebuttable presumption that members of racial minorities were so disadvantaged.

Third, the relief sought by petitioner is expressly limited to the utilization of SCCs in future federal contracts. The instant litigation was apparently triggered by the rejection in 1989 of petitioner's bid to supply guardrails for a highway project known as the West Dolores Project. Petitioner alleged that the guardrail subcontract was given instead to a DBE which had submitted a bid higher than that of the petitioner. Petitioner's 1990 complaint, however, did not ask that petitioner be awarded the disputed subcontract, or request damages or any other form of monetary relief in connection with the West Dolores Project.[8] Perhaps coincidentally, the complaint did not allege that the particular DBE which won the guardrail contract for the West Dolores Project had qualified as a DBE because of the disputed minority-disadvantage presumption, or even that that DBE was minority-owned.

Because the complaint seeks solely prospective injunctive relief, petitioner has standing only if it faces a real and reasonably immediate injury if use of the disputed minority- disadvantage presumption is not enjoined. The record makes clear that that is not the case. Although

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racial preference."). Petitioner's brief in this Court contains no reference to the rule regarding businesses owned and managed by women.

[8] J. App. 22-23. Neither the Statement of the Facts in the petition, pp. 4-6, nor the Statement of the Case in petitioner's brief, pp. 5-18, mentions this limitation on the relief requested.

petitioner has been in business since 1976,[9] and the SCC has been in use since 1979,[10] petitioner has been able to identify only one instance -- the West Dolores Project -- in which petitioner assertedly lost a contract because of the SCC.[11] As we set out in part III, *infra*, whether the minority-disadvantage presumption will again affect petitioner in the future, least of all in the near future, is utterly speculative.

II. PETITIONER LACKS STANDING TO SEEK DECLARATORY OR PROSPECTIVE INJUNCTIVE RELIEF UNLESS IT CAN DEMONSTRATE A SUBSTANTIAL RISK OF REASONABLY IMMINENT INJURY FROM THE PRACTICE WHICH IT SEEKS TO ENJOIN

This Court has repeatedly held that a plaintiff cannot establish standing to seek declaratory or prospective injunctive relief merely by proving that he or she has been

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[9] Pet. Br. 7 ("Adarand has engaged continuously in this business since 1976.").

[10] Pet. App. 6 ("The SCC program was implemented in 1979....").

[11] Plaintiff's Answers to Defendants' Interrogatories, Attachment 1.

An official of Adarand suggested that because of the SCC the firm had also lost a subcontract to a DBE in connection with a highway construction project at McClure Pass. Deposition of Steven Goeglein, p. 21. Adarand's own records revealed, however, that the guardrail subcontract on the McClure Pass project was actually won by a non-DBE firm which underbid Adarand. Plaintiff's Answers to Defendant's Interrogatories, Attachment 3, Project FH 15-1; *id.*, Attachment 1, Project FH 15-1; Defendants' Responses to Plaintiff's Requests for Production of Documents, "CFHLD Project with Guardrail," Project FH 15-1.

injured in the past by a challenged practice. Unless such a plaintiff also faces injury in the proximate future from a repetition of that practice, he or she would lack a substantial stake in whether continued use of the practice is enjoined. Absent such an impending injury, issuance of the injunction would confer no palpable benefit on the plaintiff, and would provide no redress for any imminent harm.

The Court has on repeated occasions invoked this aspect of standing jurisprudence to deny declaratory or prospective injunctive relief. In *Golden v. Zwickler*, 394 U.S. 103 (1969), the plaintiff, a former member of Congress, had been convicted under a New York law forbidding the circulation of anonymous political pamphlets; he sued for a declaratory judgment that the statute was unconstitutional. Although the plaintiff alleged that he intended to distribute similar leaflets in subsequent elections, 394 U.S. at 106, this Court concluded that the plaintiff lacked standing to seek such relief because there was not a "real [or] immediate" prospect that the plaintiff would run for office again in the near future, and thus it was "wholly conjectural that another occasion might arise" when the plaintiff might again be prosecuted. 394 U.S. at 109.

In *O'Shea v. Littleton*, 414 U.S. 488 (1974), the plaintiffs claimed that they had been subjected to unreasonably high bail and unusually harsh sentences as part of a scheme of intentional racial discrimination on the part of police and judicial officials. In *O'Shea*, as here, the plaintiffs sought no damages as a result of past actions, but requested purely prospective relief. In holding that the plaintiffs lacked standing to seek such relief, the Court insisted that the "threat of injury must be both 'real and immediate', not 'conjectural' or 'hypothetical'." 414 U.S. at 494. The plaintiffs had "not pointed to any imminent prosecutions contemplated against any of their number." 414 U.S. at 498.

> Apparently, the proposition is that *if* [plaintiffs] proceed to violate an unchallenged law and *if* they are charged, held to answer, and tried in any proceedings before [defendants], they will be subjected to the discriminatory practices that [the defendants] are alleged to have followed.

414 U.S. at 497 (Emphasis in original). The Court concluded that such a possible injury was simply too "conjectural" to support standing. 414 U.S at 502; see *id.* (equitable relief requires "the likelihood of substantial and immediate irreparable injury").

The complaint in *Ashcroft v. Mattis*, 431 U.S. 171 (1977), sought a declaratory judgment holding unconstitutional a state law that authorized the use of deadly force against non-dangerous fleeing suspects. See *Garner v. Tennessee*, 471 U.S. 1 (1985). The plaintiff, the father of an 18 year old who had been killed by the police, asserted that he had a second son who was also at risk. The complaint alleged that:

> if ever arrested or brought under an attempt at arrest on suspicion of a felony, [the surviving son] *might* flee or give the appearance of fleeing, and would therefore be in *danger* of being killed....

431 U.S. at 172 n. 2 (Emphasis by Court). The Court dismissed the case for failure to present a case or controversy, reasoning that "[s]uch speculation is insufficient to establish the existence of a present, live controversy." *Id.*

In *Los Angeles v. Lyons*, 461 U.S. 95 (1983), the plaintiff had allegedly been the victim of unconstitutionally excessive force in the form of a chokehold then utilized by

the Los Angeles Police Department. Although acknowledging that Lyons could maintain an action for damages, the Court dismissed for lack of standing the count of Lyons' complaint that sought injunctive relief. The Court reasoned that Lyons would have had standing to seek such prospective relief only if he could demonstrate the existence of an "immediate," 461 U.S. at 105, 107, 110-11, and "realistic threat," 461 U.S. at 106 n. 7, that he would again be subject to such abuse by the police. The Court emphasized that no further such incidents had occurred in the five months following the only known occasion on which Lyons had been assaulted. 461 U.S. at 108.

Whitmore v. Arkansas, 495 U.S. 149 (1990), noted that the Court's earlier decisions demonstrated

> what we have said many times before and reiterate today: Allegations of possible future injury do not satisfy the requirements of Art[icle] III. A threatened injury must be "'certainly impending'" to constitute injury in fact.

495 U.S. at 158. That requirement could not be satisfied in *Whitmore* by "speculation and conjecture" that appellate review of the conviction and death sentence that had been imposed on one defendant might provide information helpful to another capital defendant. *Id.*

This Court most recently applied these principles in *Lujan v. Defenders of Wildlife*, 504 U.S. ____, 119 L. Ed. 2d 351 (1992). The plaintiffs in that case sought to enjoin certain actions by the Secretary of the Interior which they alleged would imperil the Nile crocodile in Egypt and the Asian Elephant in Sri Lanka. The plaintiff organization based its claim of standing on affidavits from two members, both residents of the United States, who stated that they

respectively had visited in the past, and intended to return in the future to Egypt and Sri Lanka to observe the allegedly imperiled animals. This Court held that those affidavits were insufficient to establish the plaintiffs' standing to seek injunctive relief:

> [T]hese affidavits ... plainly contain no facts ... showing how damage to the species will produce "imminent" injury to [the affiants] ... "'[P]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief....'" ....[T]he affiants' profession of an "inten[t]" to return to the places they had visited before -- where they will presumably ... be deprived of the opportunity to observe animals of the endangered species -- is simply not enough. Such "some day" intentions -- without ... any specification of <u>when</u> the some day will be -- do not support a finding of the actual or imminent injury that our cases require.

119 L. Ed. 2d at 367[12] (Emphasis in original). The Court stressed that a plaintiff's burden is particularly heavy if the likelihood of injury "depends on the unfettered choices

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[12] See *id*. at 367 n. 2:

"Although imminence is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to insure that the alleged injury is not too speculative for Article III purposes -- that the injury is '<u>certainly</u> impending ....' ... It has been stretched beyond the breaking point where, as here, the plaintiff alleges only an injury at some indefinite future time, and the acts necessary to make the injury happen are at least partly within the plaintiff's own control. In such circumstances we have insisted that the injury proceed with a high degree of immediacy, so as to reduce the possibility of deciding a case in which no injury would have occurred at all." (Emphasis in original).

made by independent actors not before the courts," 119 L. Ed. 2d at 365, or turns on circumstances "at least partly within the plaintiff's own control." 119 L. Ed. 2d at 367 n. 2. Both of those complicating considerations are present in the instant case.

The circumstances of this case, as set out below, are readily distinguishable from those in *Northeastern Florida Chapter of AGC v. City of Jacksonville*, 124 L. Ed.2d 586 (1993). First, the plaintiff in *Northeastern* was an association of 240 contractors and subcontractors;[13] counsel for the plaintiffs there conceded that the standing question would have been very different if he had represented only a single firm.[14] Second, the plaintiffs in *Northeastern* alleged that they "regularly bid on"[15] the contracts actually affected by the disputed set-aside; here petitioner had bid on only one such subcontract in eleven years. Third, the ordinance at issue in *Northeastern* applied to *all* purchases made by the City of Jacksonville; here the SCC is found on average in less than one contract per year per state, and in many of even those limited instances the SCC is for practical reasons devoid of operational significance. Fourth, the set-aside provision in *Northeastern* precluded non-MBE firms from even bidding on many contracts. The SCC has no such effect; petitioner in fact bid for the subcontract in the disputed West Dolores Project.[16] Petitioner's claim is not

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[13] Northeastern Florida Chapter of AGC v. City of Jacksonville, No. 91-1721, Joint Appendix, p.10.

[14] Transcript of Oral Argument, Feb. 22, 1993, p. 13.

[15] *Northeastern*, J. App. 18, 124 L. Ed.2d at 593.

[16] Petitioner concedes that the only instance in which it decided not to bid on a contract because of a set-aside involved a <u>state</u> contract. Deposition of Steven Goeglein, p. 14-15.

that it is barred from bidding, but that, at some remote point in the future, it may "not win," a claim analogous to that of the unsuccessful plaintiffs in *Warth v. Seldin*, 422 U.S. 490 (1975). See *Northeastern*, 124 L. Ed.2d at 598.

Finally, this case, unlike *Northeastern*, is largely concerned with the actions of agencies and individuals who simply are not before the Court. See *Lujan v. Defenders of Wildlife*, 119 L. Ed.2d at 365. Petitioner objects not to the SCC incentive for subcontracting with DBEs, but to the manner in which the list of eligible DBEs is complied. The list of eligible DBE's, however, is prepared not by the FHWA or any other respondent, but by Colorado state officials.[17] The particular manner and extent to which Colorado officials in practice rely on the minority-disadvantage presumption is entirely unclear, and cannot readily be litigated in the instant case. See *General Bldg. Contractors Assoc. v. Pennsylvania*, 458 U.S. 375 (1982). In addition, what impact if any an SCC may have on petitioner will depend on the independent actions of future general contractors, who are free to disregard the SCC incentive where it exists, and to prefer a DBE bidder even if no SCC is applicable. See *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976).

III. PETITIONER FACES NO REAL AND IMMINENT INJURY BY REASON OF THE MINORITY - DISADVANTAGE PRESUMPTION

Whether in any given case a plaintiff faces a real and imminent injury by reason of a challenged practice is necessarily a fact-specific question. In the instant case petitioner has been able to identify only one instance since 1979 in which it lost a contract because of the SCC, and

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[17] Deposition of James L. Robinson, p. 107.

even here there is no express claim that the DBE which won the West Dolores subcontract had obtained DBE status because of the minority-disadvantage presumption. The record in the instant case makes clear why the SCC has had only this single isolated impact on petitioner, and why a recurrence, while not impossible, is far from sufficiently certain to provide petitioner with standing.

(1) The threshold problem is that there are relatively few construction projects which are contracted for directly by FHWA. In 1989 and again in 1990, FHWA awarded in the entire state of Colorado only a single direct bid contract involving guardrail subcontracting.[18] The annual FHWA expenditure for forest highway projects is only $55 million. (Pet. App. 7 n.4). The West Dolores Project, typical in size for the FHWA,[19] totalled more than $1 million; at that rate the FHWA could fund fewer than fifty contracts annually, approximately one contract per state per year. Not all of these highway projects will involve subcontracted guardrail work; in those cases in which it is competent to do so, the general contractor ordinarily builds the guardrails itself.[20] The record reveals that during the eight year period from 1983 to 1990, inclusive, the FHWA office in the instant case, which is responsible for

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[18] Defendants' Responses to Plaintiff's Requests for Production of Documents, Attachment "CFLHD Projects with Guardrail", Projects FH 60-2(2) and FH 59-3(3).

[19] "Direct Federal Program FY 1983 Estimate of MBE/WBE/SBC Procurements" (Average contract of $1 million).

[20] Deposition of Randy Pech, p. 19. In approximately 20% of all FHA construction projects no guardrail work is subcontracted. Defendants' Answers to Plaintiff's Interrogatories, p. 1 (no guardrail work subcontracted in 14 of 78 projects).

thirteen states,[21] had a total of only sixty-four direct bid contracts in which guardrail work was subcontracted,[22] an average of less than one such subcontract per year per state. Petitioner ordinarily bids only on projects in Colorado[23], and its business consists almost exclusively of guardrail work.[24] As a practical matter, all but a small fraction of Adarand's work is on state and city rather than federal contracts.[25] During a single year FHWA does fund several hundred state-managed highway construction projects in Colorado[26], but none of these are subject to an SCC.

(2) Even in those isolated instances in which the FHWA does issue a direct contract in Colorado, the terms of the contract would have no impact on petitioner unless petitioner actually bids for the guardrail subcontracting work. Petitioner concedes that it does not ordinarily bid on certain types of guardrail projects where "we don't feel like we are totally qualified on it."[27]

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[21] Pet.App. 9 n.7.

[22] Defendants' Answers to Plaintiff's Interrogatories, p.9.

[23] Deposition of Randy Pech, p. 22.

[24] *Id.* at 26, 27.

[25] *Id.* at 14-18.

[26] Defendants' Responses to Plaintiff's Requests for Production of Documents, Attachment "FY 1988 Twelve Month Report of Federal-Aid."

[27] Deposition of Randy Pech, pp. 13-14 (distinguishing Type 3, guardrail in which Adarand "specialize[s]", from Type 4 guardrail); Deposition of Steve Goeglein, p. 9 (Adarand bids on Type 3 guardrail).

Petitioner can identify only six instances from 1976 through 1990 in which it actually bid on an FHWA contract.[28]

(3) Not every direct-bid contract let by FHWA contains an SCC. In some instances, pursuant to section 8(a) of the Small Business Act, a contract is awarded to a DBE general contractor.[29] In such cases the general contract contains no subcontracting compensation clause, and the general contractor has no financial incentive to award guardrail or any other subcontracts to a DBE. As a practical matter, most DBEs who work on FHWA direct bid contracts do so as general contractors, pursuant to section 8(a), the validity of which petitioner does not here challenge.[30] On the one occasion in which it bid for the guardrail subcontract work for a section 8(a) contract, Adarand won the subcontract.[31] The SCC is also omitted from certain non-section 8(a) contracts.[32] Petitioner can identify only one contract on which it ever

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[28] Plaintiff's Answers to Defendants' Interrogatories, Attachment 1. At least one of these was a section 8(a) contract, which contains no SCC. See part III (3), *infra.*

[29] "[T]he [SCC] clause is . . . not included in the 8(a) contracts. . . ." Petitioner's Brief, p. 6 n.3; Deposition of Craig Actis, p. 14.

[30] Deposition of James L. Robinson, pp. 39, 57-58, 67. Petitioner has never sought to serve as the general contractor on any FHA direct-bid project. Deposition of Randy Pech, pp. 17-18.

[31] Plaintiff's Answers to Defendants' Interrogatories, Attachment 1, Project WYFH 11-1(3).

[32] Deposition of James L. Robinson, pp. 39, 57-58, 67.

bid which actually contained an SCC -- the West Dolores project.[33]

(4) In other instances, although a contract does contain an SCC, the compensation provided by the SCC is of no practical significance because the general contractor is required by other contact terms to submit and adhere to a specific plan for subcontracting with DBEs. Whenever a large general contractor receives a direct-construction contract worth in excess of $1 million, the FHWA requires that contractor to submit an acceptable written "subcontracting plan"[34]. "The subcontracting plan must specify the "[t]otal dollars to be subcontracted to small disadvantaged business concerns" and provide for certain specified assistance to such DBEs.[35] In the case of the West Dolores Project, the general contractor was too small to be subject to this "subcontracting plan" requirement;[36] the SCC was thus of operational significance. But a larger contractor with a subcontracting plan would be under an independent obligation to subcontract to DBEs the amount of work specified in its subcontracting plan, and thus would not ordinarily be affected by the deletion or modification of

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[33] Plaintiff's Answers to Defendants' Interrogatories, Attachment 1.

[34] 48 C.F.R. § 19.704; 15 U.S.C. § 637 (c)(6); Answer, Exhibit A, p. 1; *id.*, Exhibit B, pp. F-13 to F-16; Deposition of James L. Robinson, p. 79. The form for submitting such plans is reproduced as an attachment to Defendants' Responses to Plaintiff's Requests for Production of Documents, "Subcontracting Plan Submitted In Accordance With Public Law 95-507."

[35] Answer, Exhibit B, pp. F-13, F-16.

[36] Deposition of James L. Robinson, p. 77, 91.

the SCC.[37] Petitioner is not challenging in this appeal the subcontracting plan requirement.

(5) Even in the case of a contractor whose contract contains an SCC but no subcontracting plan, the SCC at times will have no actual impact on the contractor's behavior. The compensation provided by the SCC is not contingent on the contractor extending any special bidding preference to a DBE; if lowest bidder for a subcontract of the requisite size happens to be a DBE, the contractor receives the specified additional payment, even though the contractor would have awarded the subcontract to the low-bidding DBE regardless of the SCC. The record in this case reveals that this does occur.[38] If the low bidder on a non-guardrail subcontract were already a DBE, the SCC would provide the general contractor no incentive to favor a higher bidding DBE over petitioner in awarding a guardrail subcontract.

(6) Even where there is no such DBE low bidder, it is far from certain that the SCC will affect the award of a guardrail subcontract. A general contractor might chose to qualify for compensation under the SCC by seeking a DBE for some form of subcontracting work

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[37] The Court of Appeals described the SCC as a provision "included in small-value contracts or where the prime contractor is a small business." Pet. App. 6. The record indicates the SCC is also included in large contracts with large business, but in those cases the SCC is of no operational significance.

[38] Deposition of Steven Goeglein, p. 15; Plaintiff's Answers to Defendants' Interrogatories, Attachment 1, Project FH 59-3(3) (Adarand underbid by DBE); Project FH 60-1(1) (Adarand underbid by DBE).

other than guardrail construction. In addition, the SCC provides only an additional payment equal to 1.5 to 2% of the contract; thus if the cost of training and assisting a DBE, plus any difference between the bid of the DBE and the lowest non-DBE bid, exceeds the proffered compensation, the general contractor will lose money by contracting with the DBE, and presumably will refuse to do so. Even where the DBE's bid is close enough to the non-DBE bid for the SCC to avoid such a loss, general contractors may nonetheless decide to contract with the non-DBE firms for a variety of reasons, such as prior business relationships.[39] For whatever combination of reasons, many FHWA general contractors whose contracts include an SCC in fact do chose not to subcontract with DBE firms[40]; for the years 1982-85 only about 60% of such general contractors subcontracted with *any* DBE's.[41] Of the three non-section 8(a) subcontracts bid on by petitioner for which a non-DBE firm was the low bidder, the low bidding non-DBE firm actually won two of the subcontracts.[42]

(7) Even in the uncertain event that petitioner bids on a subcontract which is awarded to a DBE because of the SCC, an injunction modifying the way firms are

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[39] Deposition of Craig Actis, pp. 24, 26.

[40] Deposition of James L. Robinson, p. 90.

[41] Evaluation of Direct Federal DBE Subcontracting Compensation Clause, Fiscal Years 1982, 1983, 1984, 1985, Appendix D (72 of 182 general contractors receive no compensation under SCC; 70 of 182 general contractors had *no* subcontracts with DBE's.)

[42] Plaintiff's Answers to Defendants' Interrogatories, Attachment 1, Projects FH 60-2(2), FH 20-1(1) FH 15-1(10).

designated as DBEs could have no impact on petitioner unless Adarand were itself the lowest bidder on the project.

(8) Even when and if petitioner were to face loss of a contract because of the SCC, the injunctive relief sought in this case might still confer no benefit on petitioner. Petitioner attacks only the use of the minority-disadvantage presumption. An injunction against utilization of that presumption would afford petitioner no benefit if the next DBE to which it loses a subcontract by virtue of the SCC is owned and managed by whites, by women, or even by minorities, if those minorities were able to demonstrate, without the assistance of the challenged presumption, that they were in fact socially and economically disadvantaged.

In light of all these circumstances, it is readily understandable why petitioner can point to only a single case between 1979 and 1990 in which it allegedly lost a subcontract because of the SCC. Obviously, the possibility that petitioner will lose one contract every eleven years falls far short of imminent injury.

IV. RESOLUTION OF PETITIONER'S CHALLENGE TO THE MINORITY-DISADVANTAGE PRESUMPTION WOULD BE PREMATURE

Dismissal of the instant action for lack of standing will not, of course, leave petitioner without a remedy if at some point in the future it actually faces loss of a subcontract because of the disputed minority-disadvantage presumption. Should that occur, petitioner itself acknowledges, it is entitled to seek to persuade officials that, despite the presumption, the minority-owned firm competing with it does not in fact qualify for DBE status. If faced with

the imminent loss of a subcontract because of the minority-disadvantage presumption, petitioner could at that point seek injunctive relief against the officials preparing the DBE list, against federal officials to enjoin payment under the terms of the SCC, or against the general contractor for an order awarding petitioner the disputed contract. Petitioner might in at least some circumstances have an action for damages.

The merits of petitioner's challenge to the minority-disadvantage presumption necessarily turns to some degree on circumstances which may be quite different today than they will be if and when petitioner actually faces at some point in the future an immediate likelihood of being affected by that presumption. In the instant appeal, for example, the parties are in dispute regarding the adequacy of congressional findings (Pet. Br. 34-39, 42-43), the sufficiency of the information on which the FHWA relied in adopting the SCC (Pet. Br. i, 48), and the adequacy of the evidence "in the record" in this case to justify the minority-disadvantage presumption. (Pet. Br. 34). All of these circumstances are likely to be different in the future than they were when the instant case arose in 1989.

Similarly, the outcome of any constitutional challenge to the minority-disadvantage presumption may conceivably turn on the manner and frequency with which the presumption is utilized, the responses of officials to challenges to the DBE status of minority firms, or the actual availability of DBE status to non-minority firms. At this juncture in the instant case the record is silent on all of these questions. But it is clear that the method of selecting firms advantaged by the SCC has changed substantially since

1979 [43], and there is no reason to believe that it will not change again in the future.

Finally, the status of petitioner itself under the SCC will not necessarily remain the same as it is today. Under current practice all firms owned and operated by women are treated as DBEs. In the instant case, ninety percent of Adarand stock is concededly owned by women.[44] In addition, Adarand's President is a woman. [45] Petitioner asserts that at this point in time it is ineligible for DBE status as a female-owned and operated firm because Adarand's general manager is a man.[46] Assuming,

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[43] At one time the SCC was expressly limited to minority owned firms. See "Evaluation of Direct Federal's MBE subcontracting Compensation Clause - Consolidated Report - January 1982," p. 1 (clause applies to "minority business enterprise[s]"). In 1983 this standard was replaced the DBE system, which permits inclusion of white-owned firms and accords to minority owned firms only a rebuttable presumption of disadvantage. Pet. App. 7 n.4; Female owned firms were included as DBEs in 1987. Defendants' Answers to Plaintiff's Interrogatories, p. 10.

[44] Deposition of Randy Pech, pp. 11-12; deposition of Steven Goeglein, p.8; Pet. App 10 n. 8.

[45] Deposition of Randy Pech, p.12; see *id.* at 35 (female president "authorizes payments of bills. She is responsible for the contracts to make sure they are written not to hurt us. She reviews the contracts and signs them and makes the additions or deletions to the contracts as needed....She makes sure the unit prices are correct and makes sure they don't have a clause in there that is unrealistic to us...."); J. App. 32 (woman president since 1988); Plaintiff's Answers to Defendants' Interrogatories, p. 3 (woman president).

[46] Pet. Br. p.7 ("Adarand is not eligible for a presumption... because its 'management and daily business operations are controlled by'... a white male"); see deposition of Randy Pech, p.5 (describing position as "[g]eneral manager"). Pech owns no stock in Adarand.

arguendo, that that circumstance would preclude petitioner from invoking the gender-based classification as a DBE,[47] it is entirely possible that Adarand's stockholders and president may in the future decide to name a woman as general manager. Manifestly the legal issues presented would be very different if petitioner, having itself been placed on the DBE list by virtue of the gender-based rule, were then to challenge use of the mere presumption of disadvantage accorded minority owned and managed firms.

It is, of course, impossible to foresee the extent to which these or other possibly significant developments might transpire between now and the date, if any, on which petitioner actually faces loss of a subcontract by reason of the minority-disadvantage presumption. Even if some form of injunction relief were awarded in the instant case, however, it would be subject to modification if such changes were to occur in the interim.

Id. at 10 ("Q. What portion of Adarand do you own now? A. None.").

[47] The employment of a man as general manager would not necessarily preclude classification of Adarand as a woman-owned business. FAR Contract Clause 52.219-13 requires only that women "exercis[e] the power to make policy decisions" and are "actively involved in the day-to-day management of the business." Answer, Exhibit B, p. F-16. On the other hand, a firm which is in reality owned and operated by a non-disadvantaged man could not qualify as a DBE merely by conferring purely nominal ownership and job titles on women or disadvantaged individuals.

CONCLUSION

For the above reasons, the decision of the court of appeals should be vacated, and the case remanded with instructions that it be dismissed for lack of jurisdiction.

Respectfully submitted,

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BRIEF AMICUS CURIAE OF THE LATIN AMERICAN MANAGEMENT ASSOCIATION IN SUPPORT OF RESPONDENTS

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BRIEF AMICUS CURIAE OF THE LATIN AMERICAN MANAGEMENT ASSOCIATION IN SUPPORT OF RESPONDENTS

INTEREST OF AMICUS CURIAE

The Latin American Management Association ("LAMA") is a non-profit organization located in Washington, D.C., the mission of which is to advance the interests of Hispanic-owned businesses and other small, minority-owned firms in the federal and commercial contracting arenas. Many of LAMA's members participate

in federal contracting programs designed to promote the development of firms owned by socially and economically disadvantaged individuals, including the Small Business Administration's section 8(a) program. The continued viability of many disadvantaged businesses rests on the technical, managerial and contractual assistance made available through these programs.

The letters of Petitioner and Respondents consenting to the filing of this brief amicus curiae have been filed with the Clerk of the Court pursuant to Rule 37.3, Rules of the Supreme Court of the United States. Amicus files this brief on the merits to support the position of the Respondents to this action.

SUMMARY OF ARGUMENT

Acts of Congress have been accorded great weight by this Court in recognition of the unique powers of the National Legislature. Because Petitioner challenges racial and ethnic classifications created by federal statutes, the less exacting standard of scrutiny described in *Fullilove v. Klutznick*, 448 U.S. 448 (1980), should be applied. The challenged statutes were passed by Congress in furtherance of important governmental objectives, which are to remedy past discrimination and foster the development of businesses owned by socially and economically disadvantaged individuals who have historically been the victims of discrimination.

The Small Business Act's eligibility criteria, as incorporated in the STURAA program, are narrowly tailored to provide business development opportunities to firms owned and controlled by socially and economically disadvantaged individuals. These criteria are not underinclusive in that they do not *ipso facto* exclude any individual or group from eligibility. Also, these criteria are

not overinclusive because they do not allow participation by socially disadvantaged persons who have experienced relative economic success.

ARGUMENT

Petitioner asks the Court to consider the constitutionality of an Act of Congress, "the gravest and most delicate duty that this Court is called on to perform." *Fullilove v. Klutznick*, 448 U.S. 448, 472 (1980) (quoting *Blodgett v. Holden*, 275 U.S. 142, 148 (1927)). After all, it is Congress that is "charged by the Constitution with the power to 'provide for the . . . general Welfare of the United States' and 'to enforce, by appropriate legislation,' the equal protection guarantees of the Fourteenth Amendment." *Fullilove*, 448 U.S. at 472.

Petitioner's challenge arises out of the Central Federal Lands Highway Division's Subcontracting Compensation Clause program, which is funded by section 106(a)(8) of the Surface Transportation and Uniform Relocation Assistance Act of 1987, Pub. L. No. 100-17, 101 Stat. 132, 145 (1987) (hereinafter "STURAA" or "STURAA program"). Section 106(c) of STURAA establishes, as a general rule, that not less than ten percent of the STURAA program's appropriated funds be expended with small businesses "owned and controlled by socially and economically disadvantaged individuals," which are referred to as "Disadvantaged Business Enterprises" ("DBEs").[1] This provision is authorized by section 502

[1] Although the STURAA program makes reference to "disadvantaged business enterprises," other similar programs make reference to "small and disadvantaged businesses." Both terms, however, refer to small businesses that are owned and controlled by individuals who are "socially and economically disadvantaged," as defined in the Small Business Act.

of the Small Business Act, 15 U.S.C. §644(g), which directs federal agencies to achieve at least five percent participation by small and disadvantaged businesses in federal contracting programs.

Section 106(c)(2)(B) of STURAA defines "socially and economically disadvantaged inviduals" by reference to the Small Business Act, 15 U.S.C. §637(d). It is the "presumption" contained in section 8(d) of the Small Business Act which is at the very core of this case:

> The contractor shall presume that socially and economically disadvantaged individuals include Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans and other minorities, or any other individual found to be disadvantaged by the [Small Business] Administration pursuant to section 8(a) of the Small Business Act.

15 U.S.C. §637(d)(3)(C).[2]

However, the term "socially disadvantaged individuals" does not exclude any individuals from qualifying:

> Socially disadvantaged individuals are those who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities.

15 U.S.C. §637(a)(5).

The term "economically disadvantaged individuals" is defined as follows:

> Economically disadvantaged individuals are those socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged.

15 U.S.C. §637(a)(6)(A).

[2]Section 8(d) refers to "the contractor" because it was intended to impose requirements on prime contractors in their relationships with subcontractors owned by socially and economically disadvantaged individuals. *See* 15 U.S.C. §637(d).

Petitioner contends that the STURAA program's authorizing statute, section 502 of the Small Business Act, as well as the "presumption" incorporated into the STURAA program by reference, create unconstitutional racial and ethnic classifications. The precepts on which this position rest are flawed.

I.
FULLILOVE AND *METRO BROADCASTING* APPLY TO THE STATUTES CHALLENGED IN THIS CASE.

Petitioner seeks to heighten the judicial scrutiny of federal programs established by Congress in which racial or ethnic criteria are employed for remedial purposes. Implicit in this request is that this Court ignore *Fullilove*, which established the applicable standard of review under such circumstances, in favor of the standard in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

The Small Business Act's small and disadvantaged business goal and the section 8(d) "presumption" were designed by Congress to eliminate the present effects of past discrimination and to foster the development of businesses owned by socially and economically disadvantaged individuals. In such an effort:

> Congress has necessary latitude to try new techniques such as the limited use of racial and ethnic criteria to accomplish remedial objectives; this is especially so in programs where voluntary cooperation with remedial measures is induced by placing conditions on federal expenditures. That the pro-

> gram may press the outer limits of congressional authority affords no basis for striking it down.

Fullilove, 448 U.S. at 490.

The "great weight" accorded to congressional action is in recognition that "in no organ of government, state or federal, does there repose a more comprehensive remedial power than in the Congress, expressly charged by the Constitution with competence and authority to enforce equal protection guarantees." *Id.* at 484. Accordingly, the level of scrutiny articulated in *Fullilove* is appropriate.

Federal programs designed to remedy discrimination are properly subject to a lesser degree of scrutiny because Congress has broad remedial powers under the Commerce Clause, Spending Clause and Civil War Amendments. *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 563 (1990) (citing *Fullilove*, 448 U.S. at 473-78 (opinion of Burger, C.J.)); *see also Fullilove*, at 499-500, 508-09 (Powell, J., concurring). This is in contrast to state and local programs which must undergo more rigorous scrutiny under *Croson*. The reason for this dichotomy is that "the struggle for racial justice has historically been a struggle by the national society against oppression in the individual States." *Croson*, 488 U.S. at 522 (Scalia, J., concurring). Congress, as the National Legislature with the institutional competence and authority to enforce equal protection guarantees, should therefore be subject to a less exacting standard of review than state and local governments. *Fullilove*, 448 U.S. at 490 (opinion of Burger, C.J.); *id.* at 498 (Powell, J., concurring); *see also Cleland v. National College of Business*, 435 U.S. 213, 221 (1978) ("the District Court's error was . . . its failure to give appropriate deference to Congress' judgment . . . .").

Although the challenged statutory provisions were designed to correct past inequities, as discussed below, they were also intended to foster the development of small and disadvantaged businesses. Therefore, to the extent that the provisions in question are benign measures, they serve an important governmental objective and withstand constitutional scrutiny. As the Court stated in *Metro Broadcasting:*

> [B]enign race-conscious measures mandated by Congress – even if those measures are not 'remedial' in the sense of being designed to compensate victims of past governmental or societal discrimination – are constitutionally permissible to the extent that they serve important governmental objectives within the power of Congress and are substantially related to achievement of those objectives.

497 U.S. at 564.

In sum, the Court of Appeals for the Tenth Circuit properly applied the standards articulated in *Fullilove* and *Metro Broadcasting*. Accordingly, the statutes challenged in this case are subject to a leas exacting level of scrutiny, and the important governmental objectives – to provide members of historically victimized groups with the ability to develop and expand their businesses so that they are able to compete in the mainstream economy – withstand constitutional scrutiny.

II.
THE CHALLENGED STATUTES SERVE IMPORTANT GOVERNMENTAL OBJECTIVES.

The Small Business Act's small and disadvantaged business goal and the section 8(d) "presumption" serve important governmental objectives that have been clearly articulated by Congress. As such, these statutes do not

violate the equal protection component of the Due Process Clause of the Fifth Amendment.

In 1978, Congress passed the Small Business Investment Act of 1978, Pub. L. No. 95-507 ("1978 Act"), which, among other things, established the section 8(d) subcontracting program and codified existing regulations regarding the section 8(a) program, 15 U.S.C. §637(a).[3] As discussed above, the purposes of these programs are twofold. First, Congress sought to remedy past discrimination against minority-owned firms and other socially and economically disadvantaged individuals. Second, the programs were intended to offer socially and economically disadvantaged individuals the opportunity to participate fully in the free enterprise system through contracting opportunities with the federal government. Congress determined that by assisting these individuals in obtaining social and economic equality the Nation as a whole would also benefit through an improved functioning economy and more

[3]Although the eligibility requirements for the §8(a) program mirror the requirements for the STURAA program, the 8(a) program operates under a different format. To gain entry into the §8(a) program, an individual must submit a detailed application to the Small Business Administration ("SBA") which is supported by evidence that the individual is "socially and economically disadvantaged." If the SBA determines that the concern is eligible to participate in the program, it is admitted for a fixed program period. After the expiration of that period, the concern "graduates" from the program. With respect to contractual assistance under the program, federal procuring agencies are authorized to set-aside procurement opportunities for 8(a) program participants. Depending on the value of the prospective contract, award is made either on a sole-source basis, or through competition among eligible 8(a) firms. The ensuing 8(a) contract is "tripartite" in nature, with the SBA serving as the prime contractor, and the 8(a) firm serving as the SBA's subcontractor.

competition in the free enterprise system. *See* 15 U.S.C. §631(f)(1)(A)-(G).

The legislative history of the 1978 Act reveals that, in addition to fostering the development of disadvantaged businesses, Congress specifically sought to redress "past and present discrimination." H.R. Conf. Rep. No. 1714, 95th Cong., 2d. Sess. 21-22, *reprinted in* 1978 U.S. Code Cong. & Admin. News 3879, 3881-82. Congress recognized that "historic past discrimination" had hindered the efforts of many groups to "participate in the free enterprise system." S. Rep. No. 1070, 95th Cong., 2d Sess. 15, *reprinted in* 1978 U.S. Code Cong. & Admin. News 3835, 3850. Indeed, Congress found that, in many cases, business owners were tarred by their identification as members of minority groups:

> [M]any persons are socially disadvantaged because of their identification as a member of certain groups including, but not limited to, Black Americans, Hispanic Americans, Native Americans and other minorities that have suffered the effects of discriminatory practices or similar invidious circumstances over which they have no control.

H.R. Conf. Rep. No. 1714, 95th Cong., 2d. Sess. 21-22, *reprinted in* 1978 U.S. Code Cong. & Admin. News 3879, 3881-82.[4]

As co-sponsor of the Senate bill, Senator John Glenn made clear that the purpose of the 1978 Act was not only to correct the inequalities created by past discrimin-

[4]As discussed *infra*, in 1978, Congress made clear that the effects of discrimination extended beyond racial and ethnic lines and included "other Americans" who may have been subject to cultural bias. H.R. Conf. Rep. No. 1714, 95th Cong., 2d. Sess. 21-22, *reprinted in* 1978 U.S. Code Cong. & Admin. News 3879, 3881-82.

ation, but also to promote increasing levels of participation by disadvantaged businesses so that they could compete in the economic mainstream:

> [T]here is still a long way to go to move minorities into the Nation's economic mainstream. Minorities only own 4 percent of the Nation's businesses and account for less than 1 percent of total business receipts. The administration has pledged to triple Federal procurements to minorities by 1979 and I strongly support that objective. I hope that we will see committed and aggressive action by the Federal agencies whose responsibility it is to carry out that pledge.

124 Cong. Rec. 29,641 (1978).

Importantly, Congress passed the 1978 Act approximately one year after it passed the Public Works Employment Act of 1977 ("PWEA"), Pub. L. No. 95-28, 91 Stat. 116, codified at 42 U.S.C. §6701 *et seq*. As noted in *Fullilove*, the Court may look beyond the legislative history and examine the total contemporary record of congressional action dealing with the problems of discrimination against socially and economically disadvantaged business enterprises. *Fullilove*, 448 U.S. at 503 (Powell, J., concurring).[5] When Congress enacted the PWEA, there was "abundant evidence from which it could conclude that minority businesses had been denied effective participation in public contracting opportunities by procurement practices that perpetuated the effects of prior discrimination." *Id.* at 477-78. In particular, the

[5]Similarly, in *Metro Broadcasting*, the Court noted that, where "Congress has legislated repeatedly in an area of national concern, its Members gain experience that may reduce the need for fresh hearings or prolonged debate when Congress again considers action in that area." 497 U.S. at 572 (quoting *Fullilove*, 448 U.S. at 502-03 (Powell, J., concurring)).

Fullilove Court noted that the following evidence was available to Congress:

> Congress had before it, among other data, evidence of a long history of marked disparity in the percentage of public contracts awarded to minority business enterprises. This disparity was considered to result not from any lack of capable and qualified minority businesses, but from the existence and maintenance of barriers to competitive access which had their roots in racial and ethnic discrimination, and which continue today, even absent any intentional discrimination or any other unlawful conduct.

Id. at 478.

When Congress passed the 1978 Act the following year, Congress had available to it the same evidence of "historic past discrimination" in public contracting. S. Rep. No. 1070, 95th Cong., 2d Sess. 15, *reprinted in* 1978 U.S. Code Cong. & Admin. News 3835, 3850. It would have been entirely duplicative for Congress to convene hearings to compile the same evidence of "historic past discrimination" in public contracting.

Thus, Congress passed the 1978 Act and established the 8(d) "presumption" in recognition of its finding that certain racial and ethnic groups had historically suffered from the effects of discrimination. The objectives of the statute were supported by substantial evidence of past discrimination in public contracting. At that time, Congress had "abundant historical basis from which it could conclude that traditional procurement practices, when applied to minority businesses, could perpetuate the effects of prior discrimination," *Fullilove*, 448 U.S. at 478, and that "many persons are socially disadvantaged because of their identification as a member of cer-

tain groups . . . that have suffered the effects of discriminatory practices or similar invidious circumstances over which they have no control."[6] H.R. Conf. Rep. No. 1714, 95th Cong., 2d. Sess. 21-22, *reprinted in* 1978 U.S. Code Cong. & Admin. News 3879, 3881-82. Congress acted well within its power when it authorized the section 8(d) "presumption."

Unfortunately, over the course of the following decade, many of the legitimate objectives sought to be achieved by the 1978 Act were not reached.[7] Small and

[6] For example, before Congress passed the PWEA, the House Committee on Small Business issued a Report, H.R. Rep. No. 1791 (1977), which discussed a 1975 Committee Report – "Minority Enterprises and Allied Problems of Small Business" – regarding the effects of past discrimination on the participation of socially and economically disadvantaged individuals in the Nation's economy. *See* H.R. Rep. No. 1791, at 124-49, referring to H.R. Rep. No. 468 (1975). In addition to this Report, Congress had available to it a Report by the U.S. Commission on Civil Rights, "Minorities and Women as Government Contractors," regarding the barriers encountered by minority businesses in gaining access to government contracting opportunities at the federal, state and local levels. *See Fullilove*, 448 U.S. at 466-67. Congress also had available to it a Report by the U.S. General Accounting Office – "Questionable Effectiveness of the §8(a) Procurement Program," GAO/GGD-75-57 (1975). *See Fullilove*, 448 U.S. at 467.

[7] To illustrate, on July 6, 1988, hearings were held before the Government Activities and Transportation Subcommittee of the House Committee on Government Operations to review the General Services Administration's ("GSA") implementation of Public Law 95-507. Specifically, the Subcommittee reviewed compliance with the requirement that, generally, federal contracts in excess of $500,000 ($1 million for construction contracts) include a subcontracting plan with specific contracting goals for small and disadvantaged businesses. Based on information provided by the GSA, the Subcommittee determined that 589 contracts were awarded by the GSA in 1987 to prime contractors for a total of $3.4 billion. However, of that total, minority-owned small businesses received a paltry .006 percent in subcontracts. *Subcon-*

[footnote continued]

disadvantaged business participation did not rise to the levels deemed necessary by Congress to correct past inequalities. Because these businesses were not provided with the necessary assistance to allow them to compete meaningfully in the free market economy, the effects of past discrimination lingered and the need to revamp the Small Business Act was dire. Accordingly, in response to perceived failures of the 1978 Act, Congress passed the Business Development Reform Act of 1988, Pub. L. No. 100-656, 102 Stat. 3853 (1988) ("1988 Act").

The objective of the 1988 Act was to strengthen the 1978 Act by changing the 8(a) program, and encouraging all federal agencies to strive toward increasing small and disadvantaged business participation. As the Chairman of the House Committee on Small Business, John LaFalce, stated during floor debates, the 8(a) program is "intended to be the most significant effort of the Federal Government to reduce the effects of discrimination on entrepreneurial endeavors." 133 Cong. Rec. 33,315 (1987) (statement of Congressman LaFalce).

The Senate Small Business Committee's ranking Republican, Senator Lowell Weicker, echoed the concern that the effects of discrimination persisted in federal contracting. Senator Weicker also reiterated the importance of continuing these programs for the purpose of achieving fair and proportionate small and disadvantaged business representation:

> But I will again say, and the few who might have doubts about the need to continue to provide such business opportunities as this program offers, there

tracting with Small and Disadvantaged Businesses: GSA Oversight: Hearing before the Government Activities and Transportation Subcommittee of the House Committee on Government Operations, 100th Cong., 2d Sess. 2, 22 (1988).

> is still much to be done if we are ever to meet the challenge of opening doors to the minority business community to enter and rightfully participate in this Nation's rich economy. There are more than 17 million small businesses in this country, yet less than 1 million are owned and controlled by minorities and more than 90 percent of those are still single owner, mom and pop operations.

134 Cong. Rec. 31,492 (1988).

To overcome these shortcomings, Congress included a provision in the 1988 Act which established a goal to award small and disadvantaged businesses at least five percent of the total value of all prime contracts and subcontracts during each fiscal year. Pub. L. No. 100-656, §502, 102 Stat. 3887, codified at 15 U.S.C. §644(g)(1). To monitor compliance with the goal, Congress established reporting requirements. Pub. L. No. 100-656 at §§503 and 504, codified at 15 U.S.C. §644(h) and §636 note, respectively. A Commission on Minority Business Development was also established to study the efficacy of all federal programs intended to promote minority business development. *Id.* at §505, codified at 15 U.S.C. §636 note.

In short, the 1988 Act was passed in response to a recognition by Congress that the 1978 Act had failed to eliminate the effects of discrimination in federal contracting. There was little need to engage in additional fact-finding since the efforts undertaken in 1978 had been largely unsuccessful and small and disadvantaged businesses continued to struggle in their efforts to overcome the effects of past discrimination. Because Congress realized that it could not achieve its objectives without the wholehearted assistance of all federal agencies, a government-wide goal was established. Drawing

from the total contemporary record of congressional action dealing with the effects of discrimination in federal contracting, this Court should find that the statutory provisions challenged by the Petitioner are substantially related to important and well-considered governmental objectives – i.e., remedying past discrimination and promoting the development of businesses owned by socially and economically disadvantaged individuals.

III.
THE SMALL BUSINESS ACT'S ELIGIBILITY CRITERIA ARE NARROWLY TAILORED TO ALLEVIATE THE EFFECTS OF PAST DISCRIMINATION.

The Small Business Act's eligibility criteria, as incorporated by reference into the STURAA program, are narrowly tailored to ensure that only those persons intended by Congress to benefit from small and disadvantaged business programs are permitted to participate. In particular, these eligibility criteria do not exclude any person from consideration as a "socially" or "economically" disadvantaged individual. Rather, any individual who can demonstrate that he or she has been victimized by racial, ethnic or cultural bias will satisfy these eligibility standards. Additionally, individuals who have attained a relative degree of economic success are ineligible to participate even though they may be "socially" disadvantaged. Because the Small Business Act's eligibility criteria are neither overinclusive nor underinclusive, they withstand constitutional scrutiny.

As noted above, the STURAA program grants eligibility to businesses which are owned and controlled by "socially and economically disadvantaged individuals."[8]

---

[8] Under the STURAA program, subcontractors must annually certify their "socially and economically disadvantaged" status. 49

[footnote continued]

For the definition of this term, the STURAA program adopts the same standard as that which is contained in the Small Business Act, 15 U.S.C. §637(a) and (d). *See* Pub. L. No. 100-17, §106(c), 101 Stat. 146 (1987). The Small Business Act describes eligibility criteria for the section 8(a) and 8(d) programs, we well as other federal programs created pursuant to congressional mandate to eliminate the effects of discrimination in federal contracting.[9] As noted above, section 8(d) presumes that certain racial and ethnic groups, including Black Americans, Hispanic Americans, and Native Americans, are both socially and economically disadvantaged. 15 U.S.C. §637(d)(3)(C).[10]

A. Social Disadvantage

The Small Business Act defines "socially disadvantaged" individuals as those "who have been subjected to racial or ethnic prejudice or cultural bias . . . without regard to their individual qualities." 15 U.S.C. §637-(a)(5). Importantly, this definition does not grant a "preference," as Petitioner maintains, to members of any particular racial or ethnic group. Rather, as discussed below, *any* person who can make the requisite showing that he or she has been subjected to bias may qualify as "socially disadvantaged." Moreover, *any* group

C.F.R. §23.51 and Subpt. D, App. C. As discussed *infra*, this certification is subject to challenge.

[9] For example, §1207 of the National Defense Authorization Act for Fiscal Year 1987, 10 U.S.C. §2323, established a small and disadvantaged business program specific to the Department of Defense, which incorporates the Small Business Act's definition of "socially and economically disadvantaged individuals."

[10] In contrast, applicants to the §8(a) program are not presumed to be "economically" disadvantaged. *See* 15 U.S.C. §637(a)(6)(C).

may gain entitlement to the "presumption" described in section 8(d).

The flexibility within these eligibility criteria is consistent with congressional intent. Indeed, Congress sought to keep the doors to small and disadvantaged business programs open even to white individuals, provided they could make the requisite showing:

> [B]ecause of present and past discrimination many minorities have suffered social disadvantagement . . . . However, the Conferees realize that other Americans may also suffer from social disadvantagement because of cultural bias. For example, a *poor Appalachian white person* who has never had the opportunity for a quality education or the ability to expand his or her cultural horizons, *may similarly be found socially disadvantaged* . . . .

H.R. Conf. Rep. No. 1714, 95th Cong., 2d Sess. 21-22, *reprinted in* 1978 U.S. Code Cong. & Admin. News 3879, 3882. (Emphasis added).

Additionally, regulations implementing the section 8(d) program make clear that any individual may qualify as "socially disadvantaged" if he or she can prove social disadvantage by clear and convincing evidence. 13 C.F.R. §124.105(c).[11]

Moreover, although Congress listed certain groups that are "presumed" to be socially disadvantaged, the list is non-exclusive. Any "identifiable group," as a whole, may gain entitlement to the same "presumption." The SBA has established detailed procedures for such group recognition:

[11] In the case at bar, Petitioner was not *ipso facto* excluded from consideration as a "socially disadvantaged" firm.

Socially disadvantaged group inclusion –

(1) General. Upon an adequate preliminary showing to SBA by representatives of an identifiable group that the group has suffered *chronic racial or ethnic prejudice or cultural bias,* and upon the request of the representatives of the group that SBA do so, SBA shall publish in the FEDERAL REGISTER a notice of its receipt of a request that it consider a group not specifically named in paragraph (b)(1) of this section to have members which are socially disadvantaged because of their identification as members of the group for the purpose of eligibility for the 8(a) program. The notice shall adequately identify the group making the request, and if a hearing is requested on the matter and such request is granted, the time, date and location at which such hearing is to be held. All information submitted to support a request should be addressed to the AA/MSB&COD.

(2) Standards to be applied. In determining whether a group has made an adequate preliminary showing that it has suffered chronic racial or ethnic prejudice or cultural bias for the purposes of this regulation, SBA shall determine:

(i) Whether the group has suffered the effects of prejudice, bias, or discriminatory practices;

(ii) Whether such conditions have resulted in economic deprivation for the group of the type which Congress has found exists for the groups named in the Small Business Act; and

(iii) Whether such conditions have produced impediments in the business world for members of the group over which they have no control and which are not common to all small business owners. If it is demonstrated to SBA by a particular group that it satisfies the above criteria, SBA will

publish the notice described in paragraph (d)(1) of this section.

13 C.F.R. §124.105(d). (Emphasis added).

Thus, consistent with congressional intent, the "presumption" can be applied to any group of individuals that has been victimized. The aforementioned procedures comply with fundamental due process requirements in that they provide for public notice and an opportunity to present evidence at a hearing. Therefore, the "presumption" is not an arbitrary or underinclusive standard, as has been suggested. Rather, it is available to *any* group that can make the requisite showing of bias.

Furthermore, the presumption that any individual member of a designated group is "socially disadvantaged" is rebuttable. Under the STURAA program (as well as other small and disadvantaged business programs), a subcontractor's certification that it is owned and controlled by a "socially disadvantaged" individual may be protested by interested parties. *See* 49 C.F.R. §23.69; 13 C.F.R. §124.603. Therefore, rather than mandating that members of designated groups be considered "socially disadvantaged," the "presumption" shifts the burden of proof to those who choose to challenge an individual's claim of socially disadvantaged status.

Indeed, Congress has stated that membership in a designated group does not guarantee one's eligibility as "socially disadvantaged:"

> *[I]n many, but not all, cases* status as a minority can be directly and unequivocally correlated with social disadvantagement . . . .

H.R. Conf. Rep. No. 1714, 95th Cong., 2d Sess. 21-22, *reprinted in* 1978 U.S. Code Cong. & Admin. News 3879, 3882. (Emphasis added). Also, SBA regulations

provide that "*in the absence of evidence to the contrary,* the following individuals are presumed to be socially disadvantaged: Black Americans; Hispanic Americans...." 13 C.F.R. §124.105(b). (Emphasis added). Thus, an individual's membership in a designated group does not *ipso facto* lead to a finding of social disadvantage.

For example, in *Maralex Trucking, Inc.*, No. 386, Docket Nol MSBE-91-6-25-14 (SBA Office of Hearings and Appeals, Dec. 5, 1991), a Black-American applicant for the SBA's section 8(a) program certified in her application that, although she had suffered limited employment opportunities as a result of sexual discrimination, she had not suffered unemployment or limited educational opportunities as a result of racial discrimination. The SBA refused to admit the applicant into the 8(a) program. In remanding the matter following appeal, the SBA's Office of Hearings and Appeals ("OHA") noted that the applicant's statement that she had not suffered social disadvantage as a result of racial discrimination:

> [T]aken alone, might be considered to be 'evidence to the contrary,' as that term is used in §124.105(b) of the regulations, and thus a sufficient reason to deny her social disadvantage on the basis of her being a Black-American.

Decision at p. 14 n.7.

In sum, any individual may qualify as "socially disadvantaged" provided the requisite showing is made. In addition, although members of certain groups are "presumed" to be "socially disadvantaged," any "identifiable group" may gain entitlement to the "presumption" if its claim is supported by sufficient evidence of past discrimination. Finally, the "presumption" that an individual member of a designated group is "socially

disadvantaged" is rebuttable and may be disproved by interested parties.

B. Economic Disadvantage

Under the Small Business Act's eligibility criteria, social disadvantage alone will not suffice. An individual must also show that he or she has suffered "economic disadvantage." The "economic disadvantage" requirement is a legitimate color-blind criterion which limits eligible participants in small and disadvantaged business programs, including the STURAA program, to those who have felt the economic effects of discrimination. This economic criterion further demonstrates that the Small Business Act's eligibility requirements are not overinclusive, but rather, narrowly tailored to achieve legitimate objectives.

SBA regulations define "economic disadvantage" as follows:

> [E]conomically disadvantaged individuals are socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same or similar line of business who are not socially disadvantaged, and such diminished opportunities have precluded or are likely to preclude such individuals from successfully competing in the open market. In determining economic disadvantage for purposes of 8(a) program eligibility, SBA shall compare the applicant concern's business and financial profile with profiles of businesses in the same or similar line of business which are not owned and controlled by socially and economically disadvantaged individuals.
>
> (ii) This program is not intended to assist concerns owned and controlled by socially disadvantaged individuals who have accumulated substantial

> wealth, who have unlimited growth potential or who have not experienced or have overcome impediments to obtaining access to financing, markets and resources.

13 C.F.R. §124.106(a)(1). *See also* 15 U.S.C. §637(a)-(6)(A).[12]

No individual, regardless of his or her race or ethnicity, is eligible for the STURAA program (or other small and disadvantaged business programs) if that individual has advanced in the business world and overcome the impediments caused by his or her status as a socially disadvantaged individual. Thus, the assertion by *amicus curiae* Atlantic Legal Foundation that members of the designated groups are presumed to be economically disadvantaged even if they are "wealthy" (*see* Brief at 16) is inaccurate. *See Autek Systems Corp. v. United States,* 835 F. Supp. 13, 15 (D.D.C. 1993) (upholding SBA's rejection of 8(a) applicant due to owner's high income).

Although subcontractors in the STURAA program need only certify as to their DBE status, this certification may be protested by interested parties, including competing subcontractors. 49 C.F.R. §§23.51 and 23.69(a)(1). In that event, an investigation is undertaken to determine if the subcontractor is, in fact, "economically disadvantaged." 49 C.F.R. §23.69(b).

The protest procedures in the STURAA program are similar to the protest procedures created pursuant to the Small Business Act. In considering a protest which

[12] In determining "economic disadvantage" for purposes of the §8(d) subcontracting program and the Department of Defense's Small and Disadvantaged Business ("SDB") program, the SBA applies the same criteria used in determining disadvantaged status under the §8(a) program. 13 C.F.R. §124.106(a). However, in reviewing eligibility under the §8(d) and SDB programs, the SBA applies those criteria in a less restrictive manner. 13 C.F.R. §124.-106(b).

alleges that a firm is not owned and controlled by an "economically disadvantaged" individual, the SBA considers factors relating both to the financial condition of the individual claiming disadvantaged status *and* the financial condition of the business. In so doing, the SBA examines three areas:

> (1) the personal financial condition of the individual claiming disadvantaged status, including that individual's access to credit and capital;
>
> (2) the financial condition of the business; and
>
> (3) the business' access to credit, capital and markets.[13]

A finding of non-disadvantaged status not only renders the firm ineligible for award in the procurement at issue, but such a finding also renders the firm ineligible to compete in the future, absent a change in its financial condition. 13 C.F.R. §124.609(h)(2).

Regarding the first factor, a review of the owner's individual financial condition is conducted in order to exclude socially disadvantaged individuals who have "accumulated substantial wealth, who have unlimited growth potential or who have not experienced or have overcome impediments to obtaining access to financing, markets and resources." 13 C.F.R. §124.106(a)(1)(ii). The SBA considers all forms of personal income, including the individual's gross salaries, wages, remuneration, fees, allowances, dividends, commissions and receipts

[13] Specifically, the SBA examines: (1) business tax returns for the last two completed fiscal years; (2) personal tax returns for the last two years for all officers, directors and individuals owning at least five percent of the entity; (3) business financial statements for the last two completed fiscal years; (4) Articles of Incorporation and Bylaws; and (5) such other information as may be required. 13 C.F.R. §124.608.

of all kinds and descriptions. *See Super Solutions Corp.*, No. 461, Docket No. MSBE-93-12-28-19, at p. 2 (SBA Office of Hearings and Appeals, April 12, 1994).

With regard to the second factor, the SBA must "compare the applicant concern's business and financial profile with profiles of businesses in the same or similar line of business which are not owned and controlled by socially and economically disadvantaged individuals." 13 C.F.R. §124.106(a)(2)(ii). The SBA reviews the assets, revenues, pre-tax profit, working capital and net worth of the business, including the value of the investments in the business held by the individual claiming disadvantaged status. *Id.*

Finally, in considering the concern's access to credit and capital, the SBA evaluates its access to long-term and working capital financing, equipment trade credit, raw materials and supplier trade credit, and bonding capability. 13 C.F.R. §124.106(a)(5)(iii).

Despite the view of the Court of Appeals for the Seventh Circuit in *Milwaukee County Pavers Ass'n v. Fiedler*, 922 F.2d 419, 422 (7th Cir.), *cert. denied*, 500 U.S. 954 (1991), that the rebuttable presumption of disadvantaged status is "likely to be decisive," the protest procedures described above have been employed frequently and with great effect.[14]

For example, in a single federal procurement offered by the Department of the Navy, four of nine offerors in

[14]The majority of reported protests arise out of the Department of Defense's SDB program, §1207 of the National Defense Authorization Act for Fiscal Year 1987, 10 U.S.C. §2323. Like the STURAA program, this program relies on the Small Business Act's eligibility requirements.

the competitive range were found by the SBA to be non-disadvantaged, and therefore, ineligible for award. *See Integrated Systems Analysts, Inc.*, GSBCA No. 10750-P, 91-1 BCA ¶23,477 (CCH) (1990). Indeed, in *Integrated Systems Analysts*, the General Services Administration Board of Contract Appeals, in summarizing the results of protests filed during the prior three years, noted that the SBA had found "a hundred or more" firms to be ineligible and "in excess of forty" to be eligible for participation in the Department of Defense's SDB program. 91-1 BCA at p. 117,776.

In *Computer Dynamics, Inc.*, Solicitation No. N00039-88-R-0221 (SBA MSB&COD, Nov. 16, 1989), the SBA found that the protested business was not "economically disadvantaged" despite the fact that its owner was "socially disadvantaged." In declaring the company ineligible, the SBA found the owner's personal financial condition, the company's business financial condition, and the company's access to credit and capital to be above national averages. The SBA concluded that the company's owner had "accumulated substantial wealth and [had] overcome the impediments to obtaining access to financing, markets and resources." Decision at p. 4. *See also Systems Management American Corp., Inc.*, Solicitation No. N00039-88-R-0221 (SBA Office of Program Eligibility, July 11, 1990) (denying eligibility to business owned by "socially disadvantaged" individual); *DeLeon Technical Services, Inc.*, Solicitation No. F05611-92-B-2010 (SBA Office of Program Eligibility, Jan. 13, 1993) (finding "socially disadvantaged" owner's wealth was "not indicative of an individual who is economically disadvantaged"). *Cf. Apex Roofing Co.*, Solicitation No. F29651-91-B-0025 (SBA Office of Program Eligibility, Sept. 27, 1991) and *Hirsch & Co.*, Solicita-

tion No. N68711-91-D-0007 (SBA Office of Program Eligibility, March 21, 1991) (denying eligibility to "socially disadvantaged" owners unable to certify that their ability to compete in the free enterprise system had been impaired).

In short, claims of "economic disadvantage" frequently are challenged and often disproved. Unquestionably, the SBA closely monitors eligibility in accordance with definitive requirements. Accordingly, the Small Business Act's eligibility criteria are narrowly tailored and strictly enforced to achieve the legitimate objectives of redressing the effects of past discrimination and fostering the development of small and disadvantaged businesses.

C. Section 502 is Not "Limitless"

Contrary to Petitioner's assertions, section 502 of the Small Business Act, 15 U.S.C. §644(g), is not "potentially limitless" in extent and duration. Rather, the Court of Appeals for the Tenth Circuit correctly noted that federal procurement and contracting practices are subject to "regular 'reassessment and reevaluation by Congress.' " *Adarand Constructors, Inc. v. Pena,* 16 F.3d 1537, 1546 (10th Cir. 1994) (citations omitted). Indeed, the Small Business Act requires the SBA submit to the President a detailed annual report analyzing the extent of federal contracting with small and disadvantaged businesses. 15 U.S.C. §644(h)(2). The President, in turn, is required to include such information in an annual report to Congress. *Id.* at §644(h)(3).

Through the reauthorization and appropriation processes, Congress exercises periodic oversight of the section 502 small and disadvantaged business goal. In addition, outside of these processes, Congress may enact

legislation which impacts on the goal. For example, as part of the Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, §7102, Congress recently created an additional tool to assist federal agencies in meeting their individual small and disadvantaged business goals established pursuant to section 502.[15] The passage of this legislation demonstrates ongoing congressional oversight and commitment to eliminating the effects of discrimination in federal contracting. Accordingly, section 502 is not "limitless," but rather, is subject to periodic review and evaluation by Congress.

CONCLUSION

For the reasons set forth above, Amicus Curiae respectfully urges this Court to affirm the decision of the United States Court of Appeals for the Tenth Circuit.

Dated: December 5, 1994

Respectfully submitted,

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[15] Significantly, the Federal Acquisition Streamlining Act of 1994 mandates that regulations be developed to place limitations on small and disadvantaged business contracting in any industry category that is bearing a disproportionate share of small and disadvantaged business contracts. *See* Pub. L. No. 103-355, §7102(b)-(2)(D). Thus, Congress is continuing to carefully scrutinize the impact of small and disadvantaged business programs on non-disadvantaged firms.

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No. 93-1841

In The Supreme Court Of The United States

October Term, 1994

ADARAND CONSTRUCTORS, INC.,
Petitioner,

v.

FREDERICO PENA,
Secretary of Transportation, et al.,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF FOR THE EQUALITY IN ENTERPRISE OPPORTUNITIES ASSOCIATION, INC. AS AMICUS CURIAE SUPPORTING RESPONDENT

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No. 93-1841

In The Supreme Court Of The United States

October Term, 1994

ADARAND CONSTRUCTORS, INC.,
Petitioner,

v.

FREDERICO PENA,
Secretary of Transportation, et al.,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF FOR THE EQUALITY IN ENTERPRISE OPPORTUNITIES ASSOCIATION, INC. AS AMICUS CURIAE SUPPORTING RESPONDENT

INTEREST OF THE EQUALITY IN ENTERPRISE OPPORTUNITIES ASSOCIATION, INC.

This case concerns the constitutionality of, and the legal standards to be applied to, legislation passed by the United States of America designed to benefit a class or classes of insular minorities. The Equality in

Enterprise Opportunities Association, Inc. was formed for the purpose of advocating on behalf of minorities participating or desiring to participate in federal acquisition minority benefit programs. A raised level of scrutiny would significantly impact the federal subcontracting opportunities of the minorities represented by the Equality in Enterprise Opportunities Association, Inc.

STATEMENT

In 1989, the United States Department of Transportation awarded a federal highway construction project to Mountain Gravel & Construction Company ("Mountain Gravel"). *Adarand Constructors, Inc. v. Pena*, 16 F.3d 1537, 1541 (10th Cir. 1994), *cert. granted* 63 U.S.L.W. 3255 (U.S. Sept. 26, 1994) (No. 93-1841). The project included a rail construction subcontracting opportunity. *Adarand Constructors*, 16 F.3d at 1542. Mountain Gravel solicited bids from qualified subcontractors including Adarand Constructors, Inc. ("Adarand "), a non-minority owned contractor, and Gonzales Construction Company ("Gonzales"), a Hispanic American owned firm. *Id.* at 1539, 1541, 1542 n.8. Although Adarand submitted the lowest bid, Mountain Gravel awarded the subcontract to Gonzales. *Id.* at 1542.

Under the Department of Transportation contract, Mountain Gravel received $10,000 as a bonus for subcontracting with a company owned by a socially and

economically disadvantaged individual. *Id.* at 1542.[1] Gonzales, but not Adarand, was certified under section 8(a) of the Small Business Act as socially and economically disadvantaged. *Id.* at 1539, 1541 & nn.5 & 6, 1542 n.8. Under the Small Business Act, anyone can apply to be certified as socially and economically disadvantaged. 15 U.S.C. § 637(a). The Act provides a rebuttable presumption that "Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities" are in fact socially and economically disadvantaged. 15 U.S.C. § 637(d)(3)(C).

Adarand filed suit in the United States District Court for the District of Colorado claiming, *inter alia*, violation of its right to equal protection as applied to the federal government under the Fifth Amendment. *Adarand Constructors*, 16 F.3d at 1539. Adarand claimed that it had been racially discriminated against due to its non-minority ownership and that this racial discrimination violated the United States Constitution. *Id.* at 1539-40. Adarand lost on summary judgment, and appealed to the United States Court of Appeals for the Tenth Circuit. *Id.*

The Tenth Circuit examined the leading cases on affirmative action business programs, notably *Fullilove*

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[1] *But see* Adarand Constructors, Inc. v. Pena, 62 U.S.L.W. 3809 (June 7, 1994) (Petition for Writ of *Certiorari*, hereinafter "Petition") (alleging Mountain Gravel became entitled to a bonus payment of $30,000).

v. Klutznick, 448 U.S. 448 (1980), *City of Richmond v. J.A. Croson Company*, 488 U.S. 469 (1989), and *Metro Broadcasting, Inc. v. Federal Communications Commission*, 497 U.S. 547 (1990), and determined that courts must strictly scrutinize state governments when they enact affirmative action business programs. *Adarand Constructors*, 16 F.3d at 1545. The court explained, however, that the federal government need only satisfy a lesser standard of scrutiny, intermediate scrutiny. *Id.* at 1545.[2] The Tenth Circuit upheld the summary judgment because the Act's 8(a) program withstood intermediate scrutiny. *Id.* at 1547.

SUMMARY OF ARGUMENT

The essence of this action deals with the rebuttable presumption that certain minorities are socially and economically disadvantaged. All other aspects of the Small Business Act program are subject only to rational basis review.

The Fourteenth Amendment, as interpreted by the Court, grants Congress the positive power to further the right to societal participation. This right, however, is

[2] The strict scrutiny standard requires that courts strike down legislation if not "necessary" to achieve a "compelling" or "overriding" government purpose. *City of Richmond v. J.A. Croson Company.*, 488 U.S. 469 (1989). Under the intermediate scrutiny standard, a court must uphold legislation so long as it is "substantially related" to an "important" government purpose. *Id.*

limited to "discrete and insular minorities." Since Congress can legislatively recognize that certain racial classes have been historically disadvantaged, the Small Business Act's rebuttable presumption remains constitutional.

The Small Business Act, as applied to Petitioner, contains none of the hallmarks which make a racial classification suspicious. Since nothing indicates that Congress acted out of racial animus, strict scrutiny is inappropriate.

Equal protection analysis requires, at a minimum, that the offending law disadvantage or unduly burden the Petitioner in some way. Petitioner can establish no undue burden. Petitioner has never sought nor been refused certification as a socially and economically disadvantaged firm. Thus, Petitioner has never been disadvantaged by the Small Business Act's rebuttable presumption. Absent any legally cognizable detriment, Petitioner has not been denied the equal protection of the law.

The Court's holding in *City of Richmond v. J.A. Croson Company*, 488 U.S. 469 (1989), is inapplicable to this action. *City of Richmond* dealt with a local government set-aside program factually distinct from the Small Business Act's rebuttable presumption. Factual predicates noted by the Court in *City of Richmond* remain absent in this action. Since Petitioner's challenge to the Small Business Act is both factually and

legally distinct, application of the Court's holding is inappropriate.

The Court established, in *Bolling v. Sharpe*, 347 U.S. 497 (1954), a reduced standard of review for federal racial classifications. This reduced standard was reaffirmed in *Metro Broadcasting, Inc. v. Federal Communications Commission*, 497 U.S. 547 (1990). Since none of the conditions for abandoning the doctrine of *stare decisis* exist, the reduced scrutiny review remains the appropriate standard for federal legislation

ARGUMENT

The heart of Petitioner's challenge to the Small Business Act is to the legislation creating a rebuttable presumption ("Rebuttable Presumption") in federal contracting that certain classes of minorities are socially and economically disadvantaged. Petition at 6 & n.5; 15 U.S.C. 637(d)(3)(C). If considered socially and economically disadvantaged, an individual's company qualifies for special treatment on federal contract awards, including the subcontract award leading to this challenge. *Adarand Constructors*, 16 F.3d at 1547. Absent the Rebuttable Presumption, no issue exists whether the small business preferences in the Small Business Act violate the Equal Protection Clause. As an economic classification, the preferences would receive rational basis scrutiny. *See Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985); *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1

(1973). Such scrutiny must necessarily have been satisfied when the Tenth Circuit denied Petitioner's challenge through application of intermediate scrutiny. *Adarand Constructors*, 16 F.3d at 1547.

Thus, the substance of Petitioner's challenge remains the Rebuttable Presumption, which presumes that certain minorities are socially and economically disadvantaged.

I. CONGRESS MAY ENFORCE THE FOURTEENTH AMENDMENT'S RIGHT TO SOCIETAL PARTICIPATION WITH POSITIVE LEGISLATION

The Civil War Amendments were enacted for the benefit of the freed slaves. *Slaughter-House Cases*, 16 Wall. 36, 21 L. Ed. 394, 407 (1873) (The "one pervading purpose" of the Civil War Amendments "without which none of them would have been even suggested" is "the freedom of the slave race, the security and firm establishment of that freedom."). The Thirteenth Amendment freed resident African Americans from the bonds of servitude under which they had lived. However, because the Thirteenth Amendment failed to protect the civil liberties of the newly freed slaves, the Fourteenth Amendment was enacted. *Id.*

To preclude the states from abrogating the rights of the freed slaves, the Fourteenth Amendment gives Congress the power to enforce those rights: "The Congress shall have power to enforce, by appropriate

legislation, the provisions of this article." U.S. CONST. XIV AMEND. § 5. Section 5 allows Congress to "redress the effects of society-wide discrimination." *City of Richmond*, 488 U.S. 469, 490 (1989) (O'CONNOR, J., plurality opinion) ("Congress, unlike any State or political subdivision, has a specific constitutional mandate to enforce the dictates of the Fourteenth Amendment."); *see also Fullilove v. Klutznik*, 448 U.S. 448, 476 (1980) (Burger, J., plurality opinion) (Congress can require States and local governments to administer the set-aside program under § 5 of the Fourteenth Amendment.).

The affirmative right to societal participation is included in the liberties guaranteed by the Fourteenth Amendment which may be enforced by Congress. *Slaughter-House Cases*, 21 L. Ed. at 407; *see also City of Richmond v. J.A. Croson Company*, 488 U.S. 469, 511 (1989) (STEVENS, J., concurring) ("A central purpose of the Fourteenth Amendment is to further the national goal of equal opportunity for all our citizens."). The Fourteenth Amendment contains "a necessary implication of a positive immunity or right, most valuable to the colored race." *Strauder v. West Virginia*, 100 U.S. 303, 307-308 (1880). This positive right includes the right to be free from "legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy." *Id.* The right to societal participation is also evidenced by the subsequent enactment of the Fifteenth Amendment which secured for the newly freed slaves the

right to participate in the democratic process. *See Slaughter-House Cases*, 16 Wall. 36, 21 L. Ed. 394, 407 (1873). Accordingly, since the Thirteenth Amendment guaranteed that no man could be the property of another and the Fifteenth Amendment secured participation in the democratic process, the Fourteenth Amendment necessarily protects those rights incident to societal participation.[3]

The propriety of the right to societal participation has seldom been doubted, and only once by the Court. *See Plessy v. Ferguson*, 163 U.S. 537 (1896), *overruled by Brown v. Board of Education of Topeka, Shawnee County, Kansas*, 347 U.S. 483 (1954) (separation of socially incompatible races is constitutional). When the Court overruled *Plessy*'s "separate but equal" doctrine in *Brown*, it reaffirmed the Fourteenth Amendment right to societal participation. In *Plessy*, the Court determined that the Fourteenth Amendment did not assure African Americans the right to participate in American society:

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[3] From hindsight, the need for the affirmative guarantee of the Fourteenth Amendment can be explained by the problem of the majority faction. James Madison wrote: "When a majority is included in a faction, the form of popular government. . .enables it to sacrifice to its ruling passion or interest, both the public good and the rights of other citizens." THE FEDERALIST No. 10, 20 (James Madison) (Washington Square Press ed. 1964). Since minorities, by definition, are not within the majority class, the affirmative guarantee to societal participation remains necessary to guard against factionist tendencies.

> The object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things, it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality, or a commingling of the two races upon terms unsatisfactory to each other.

163 U.S. at 544. "If one race be inferior to the other socially, the constitution of the United States cannot put them upon the same plane." *Id.* at 552. In overruling *Plessy*, the *Brown* Court necessarily returned to its earlier view -- that the Constitution includes the affirmative right to societal participation.

Further, the Court in *Brown* specifically addressed the right to societal participation. The *Brown* Court noted that the children on whose behalf the suits were brought were given equal treatment under the law,[4] but held that equality of treatment was insufficient: "Our decision, therefore, cannot turn on merely a comparison of these tangible factors. . . . We must look instead to the effect of segregation itself upon public education." *Brown*, 347 U.S. at 492. The Court found that mere equality of treatment socially stigmatized the

[4] "Here. . .there are findings below that the Negro and white schools involved have been equalized, or are being equalized, with respect to [all] 'tangible factors.'" *Brown*, 347 U.S. at 492 (omitting footnotes).

black children: "To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." *Id.* at 494.

The affirmative right to societal participation, however, does not extend to the majority race. The right turns on recognition of society's treatment of insular minorities as inferior. In *City of Richmond*, Justice O'Connor stated, "Classifications based on race carry a danger of stigmatic harm." 488 U.S. at 493. While Justice O'Connor clearly intended her statement to cover all races, in fact, the majority races have no need to fear stigmatism. As stated by the dissenting Justice Harlan in *Plessy*, "Sixty millions of whites are in no danger from the presence here of eight millions of blacks." 163 U.S. at 560 (Harlan, J., dissenting). Indeed, in his classic line that "our constitution is color blind," Justice Harlan cached the Constitution's blindness in terms of legislation which would maintain the supremacy of the white race over the inferior black race:

> The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth, and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage, and holds fast to the principles of constitutional liberty. But in view of the constitution, in

> the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our constitution is color-blind, and neither knows nor tolerates classes among citizens.

Plessy, 163 U.S. at 559 (Harlan, J., dissenting).[5]

While today Justice Harlan's statements may raise an eyebrow, it is nevertheless true that throughout the development of equal protection law the concern has been upon protecting racial and ethnic minorities historically treated as "inferior." *See Brown*, 347 U.S. 483 (1954); *Bolling v. Sharpe*, 347 U.S. 497 (1954) (invalidating "separate but equal" doctrine in the District of Columbia); *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985) (describing the purpose for strict scrutiny); *Metro Broadcasting, Inc. v. Federal*

[5] Justice Harlan's famous line, in modern times, has often been quoted out of context. See *City of Richmond*, 488 U.S. 469, 521 (SCALIA, J., concurring):

> At least where state or local action is at issue, only a social emergency rising to the level of imminent danger to life and limb. . .can justify an exception to the principle embodied in the Fourteenth Amendment that "[o]ur Constitution is color-blind, and neither knows nor tolerates classes among citizens."

Id. (quoting *Plessy v. Ferguson*, 163 U.S. at 537 (Harlan, J., dissenting)).

Communications Commission, 497 U.S. 547 (1990); *Fullilove v. Klutznick*, 448 U.S. 448 (1980) (upholding a set-aside to benefit disadvantaged minorities); *see also Muller v. Oregon*, 208 U.S. 412 (1908) (in the due process context, recognizing that the protection of women, as a weaker sex, requires a different rule of law).[6] When the Court first announced the "suspect" classification doctrine, in *Korematsu v. United States*, 323 U.S. 215 (1945), the Court held that the purpose for strictly scrutinizing suspect legislation, such as the internment of Japanese-American citizens, is to determine whether it was enacted in collusion with "racial antagonism." *Id.* at 216.

In the instant action, there is no evidence in the record suggesting that the owner of Petitioner has ever been subject to racial antagonism or has historically been treated as inferior. Conversely, Congress made extensive findings identifying the need for increased participation in federal contracting for minorities such as Gonzales. *See, generally,* Brief For The Respondents In Opposition at 15 n.5 (identifying three separate rounds of congressional hearings considering minority

[6] The early American citizens had no need for a Constitutional right to equal protection. The white citizens who founded our Nation could express their views on unfriendly legislation with full effect in the state houses. In fact, Alexander Hamilton even argued that the citizens needed no Bill of Rights. *See* THE FEDERALIST No. 84 (Alexander Hamilton) (Washington Square Press ed. 1964). According to Mr. Hamilton, the Constitution itself is a Bill of Rights. *Id.* at 150-153.

participation in federal contracting).[7] Certainly, Gonzales satisfied the requirements for being considered socially and economically disadvantaged. *Adarand Constructors*, 16 F.3d at 1542; Petition at 5. Had Petitioner considered Gonzales otherwise, the Small Business Act allows him to rebut the presumption of Gonzales' disadvantage. Petitioner failed to make any attempt at disproving the presumption, but rests upon the theory that the Fourteenth Amendment, which grants "discrete and insular" minorities an affirmative right to societal participation, cannot countenance a rebuttable presumption. Petitioner, in effect, requests the Court to rule that the Fourteenth Amendment precludes Congress from recognizing that certain racial classes have been historically disadvantaged in our society, both socially and economically.[8] Since the Fourteenth Amendment as

[7] In fact, when President Richard Nixon first instituted the minority program, by Executive Order No. 11,625, 36 Fed. Reg. 19,967 (1971), he stated: "The opportunity for full participation in our free enterprise system by socially and economically disadvantaged persons is essential if we are to obtain social and economic justice and improve the functioning of our national economy." *Id.* The Executive Order defined the "minority business enterprise" subject to the affirmative order to include, conclusively, "Negroes, Puerto Ricans, Spanish-speaking Americans, American Indians, Eskimos, and Aleuts." *Id.*; *contra* Petitioner's Brief at 30 (Congress did not indicate diversity as the reason for racial classifications).

[8] Petitioner, however, does not challenge the Court's ability to recognize societal disadvantage. Petitioner asks the court to apply *City of Richmond* universally, but even in *City of Richmond* it was

interpreted by this Court grants Congress that power, Petitioner's challenge must fail.

II. PETITIONER PRESENTS NO "SUSPICIOUS" LEGISLATION JUSTIFYING STRICT SCRUTINY

Petitioner's request that the Court strictly scrutinize the Rebuttable Presumption seeks a departure from judicial deference unsupported in the Court's decisions. Strictly scrutinizing legislative enactment is appropriate only when the circumstances surrounding the enactment create a fear of improper legislative motive. *Korematsu v. United States*, 323 U.S. 215 (1945); *see also United States v. Carolene Products Company*, 304 U.S. 144, 152 n.4 (1938). Petitioner presents no facts which would suggest Congress had any improper motive in enacting the Rebuttable Presumption, nor any reasons to compel such suspicion.

The fear of improper motive in a racial classification exists where there is a likelihood that a legislature acted out of prejudice or racial animus. The first time the Court suggested lessened judicial deference for legislative racial classifications, in *Carolene*

recognized that certain minorities are socially and economically disadvantaged. Justice Scalia, in his concurrence, stated "It is plainly true that in our society blacks have suffered discrimination immeasurably greater than any directed at other racial groups." 488 U.S. 469, 527-28 (SCALIA, J., concurring).

Products, the Court noted the purpose for a "more searching judicial inquiry" would be to determine if the legislation was motivated out of prejudice against "discrete and insular minorities." 304 U.S. at 152 n.4. Likewise, the first time the Court applied strict scrutiny, in *Korematsu*, the Court was examining the conviction of Mr. Korematsu, a Japanese American, for violating the west coast exclusion order, a blatantly prejudice laden fact scenario. *Korematsu*, 323 U.S. 215. The *Korematsu* Court, even while upholding the conviction, stated that "all legal restrictions" upon the "civil rights of a single racial group are immediately suspect" requiring "the most rigid scrutiny" to determine whether the offending law is motivated by "racial antagonism." *Id.* at 216.

Petitioner is not owned by a "discrete and insular minority," but instead by a member of the majority race. Petitioner suffers no legal restriction, such as a criminal conviction, but instead claims a loss of a contractual opportunity.[9] Petitioner can claim no fear that the Rebuttable Presumption was enacted out of racial animus; Congress is overwhelmingly white as is Petitioner's owner. *See* THE FEDERALIST No. 10, 19 (James Madison) (Washington Square Press ed. 1964) ("If a faction consists of less than a majority, relief is supplied by the republican principal, which enables the majority to defeat its sinister views, by regular vote.").

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[9] See, *supra*, page 18 & note 10 (the demise of *Lochner v. New York*, 198 U.S. 45 (1905)).

Thus, strict scrutiny remains inapplicable to Petitioner's claim.

III. PETITIONER CLAIMS NO BURDEN OR DISADVANTAGE COGNIZABLE UNDER THE EQUAL PROTECTION CLAUSE

According to the Small Business Act, anyone, including Petitioner, may apply and potentially qualify for treatment as a socially and economically disadvantaged firm. 15 U.S.C. 637(a). However, Petitioner never applied. For an equal protection claim to be cognizable, Petitioner must show that the Rebuttable Presumption unduly burdened it or placed it at a disadvantage. *Nebbia v. New York*, 291 U.S. 502, 521 (1934) (failure to show any disadvantage created by law is fatal); *see also Planned Parenthood of Southeastern Pennsylvania v. Casey*, 112 S. Ct. 2791, 2816-2822 (1992) (in the substantive due process context, the question is whether the law unduly burdens the individual).

The Equal Protection Clause applies to federal legislation through the Due Process Clause of the Fourteenth Amendment. *Bolling v. Sharpe*, 347 U.S. 497 (1954). The Court recently determined that review for substantive due process focuses on whether the offending law unduly burdens an individual in a fundamental right. *Casey*, 112 S. Ct. at 2816-2822 (1992). This undue burden standard has also been utilized, in part, in an equal protection challenge to

federal racial classification. *Metro Broadcasting, Inc. v. Federal Communications Commission*, 497 U.S. 547, 596 (1990) (A congressional race classification that passes intermediate scrutiny "is consistent with equal protection principles so long as it does not impose *undue* burdens on non-minorities." (emphasis in original)).

In the present action, Petitioner establishes no denial of a fundamental right or disadvantage. No fundamental right is indicated in the record. Further, Petitioner enjoys no liberty interest in federal subcontracting opportunities. The substantive analysis of legislation infringing on contractual liberty[10] has long been interred. *See Nebbia v. New York*, 291 U.S. 502 (1934).[11] Additionally, Petitioner has suffered no disadvantage. In *Nebbia*, the appellant challenged, on equal protection grounds, a law which fixed the price of milk as sold by farmers and dealers. *Id.* (the challenger also challenged the law on substantive due process grounds). The Court noted that, though the law classified the price of milk between dealers and farmers, the appellant remained free to purchase from either "had he so desired." *Id.* The appellant's failure to exercise

[10] *See* Lochner v. New York, 198 U.S. 45 (1905).

[11] Ironically, Petitioner asserts that *Metro Broadcasting* is inapplicable because of First Amendment issues present in that case. Petitioner's Brief at 28. However, Petitioner cannot bootstrap itself into strict scrutiny by suggesting the absence of a Fundamental Right weighs in favor of, rather than against, strict scrutiny.

his options proved fatal. "There is therefore no showing that the order placed him at a disadvantage, or in fact affected him adversely, and this alone is fatal to the claim of denial of equal protection." *Id.* Likewise, Petitioner, in failing even to attempt to be certified socially and economically disadvantaged, fatally foreclosed his claim of a denial of equal protection.

IV. THE HOLDING IN *CITY OF RICHMOND V. J.A. CROSON COMPANY*, 488 U.S. 469 (1989), IS LEGALLY AND FACTUALLY INAPPLICABLE

Petitioner is mistaken in its determination that the holding in *City of Richmond v. J.A. Croson Company*, 488 U.S. 469 (1989) applies to its challenge. Beyond the fact that *City of Richmond* dealt with a local affirmative action program, which deserves considerably less deference than a federal program,[12] the issues

[12] Upon concluding, in *City of Richmond*, that "a sound distinction between federal and state action based on race" was required by the Civil War Amendments, Justice Scalia stated:

> [I]t is one thing to permit racially based conduct by the Federal Government – whose legislative powers concerning matters of race were explicitly enhanced by the Fourteenth Amendment. . . – and quite another to permit it by the precise entities against whose conduct in matters of race that Amendment was specifically directed."

City of Richmond, 488 U.S. at 521-22 (SCALIA, J., concurring).

presented in Petitioner's challenge are significantly different.

In *City of Richmond*, the appellant challenged the city's 30% minority set-aside quota as a denial of equal protection. *Id.* at 478. After Justice O'Connor explained the significant Constitutional difference between states (and local governments) and the federal government in the power to enact affirmative action programs,[13] she applied strict scrutiny. *Id.* at 498-508. In finding that the quota failed strict scrutiny, Justice O'Connor noted that "the city does not even know how many MBE's in the relevant market are qualified to undertake prime or subcontracting work" and that the quota seemed "to rest upon the unsupported assumption that white prime contractors simply will not hire minority firms." *Id.* at 502.

In the present action, the Court faces a federal, not a state or local government, program. Congress knows with sufficient particularity how many insular minorities are socially and economically disadvantaged -

[13] Congress may "redress the effects of society-wide discrimination," but States may not. *City of Richmond*, 488 U.S. at 490 (O'CONNOR, J., plurality opinion). Were a State empowered to create a racial classification by "the mere recitation of a benign or compensatory purpose," the State would have "the full power of Congress under §5 of the Fourteenth Amendment" *Id.* But this "would be contrary to the intentions of the Framers of the Fourteenth Amendment." *Id.*

- most of them.[14] Congress merely embodies its knowledge and findings in a rebuttable presumption. Thus, from a legal posture and a factual lack, the holding in *City of Richmond* remains inapplicable to Petitioner's challenge.

V. THE COURT SHOULD NOT OVERRULE PRECEDENT ESTABLISHING REDUCED SCRUTINY

Consonant with the determination that section 5 of the Fourteenth Amendment gives Congress the affirmative power to legislate on behalf of those historically subject to racial antagonism are the Court's determinations in *Bolling v. Sharpe*, 347 U.S. 497 (1954), and *Metro Broadcasting, Inc. v. Federal Communications Commission*, 497 U.S. 547 (1990), that racial classifications by the federal government receive a standard of review less stringent than that applied to the States. According to the holding in *Planned Parenthood of Souteastern Pennsylvania v. Casey*, 112 S. Ct. 2791, 2808-2816 (1992), concerns for judicial integrity and respect for a National rule of law require adherence to these prior, workable decisions pursuant to the doctrine of *stare decisis*. *Id.*

[14] Certainly, Congress can take notice of matters of general knowledge to the same, or greater, extent as the judiciary. *See* Muller v. Oregon, 207 U.S. 412, 421 (1908) ("We take judicial cognizance of all matters of general knowledge.").

The first time the Court applied the equal protection component of the Fourteenth Amendment to the federal government, in *Bolling*, the Court applied a lesser standard of review than strict scrutiny. In holding that segregated schooling in the District of Columbia is discrimination severe enough to violate the Fifth Amendment's Due Process Clause, the Court stated: "Segregation in public education is not reasonably related to any proper governmental objective. . . ." *Bolling*, 347 U.S. at 500. Since this standard of review for racial classifications by the federal government has never been overruled, the Court should adhere to its determination.

Further, the Court, for all intents and purposes, reaffirmed the *Bolling* standard of review in *Metro Broadcasting*. Four years ago, in *Metro Broadcasting*, a five Justice majority applied intermediate scrutiny to a federal racial classification in federal communications licensing. In upholding the federal classification, Justice Brennan stated: "We hold that benign race conscious measures mandated by Congress. . .are constitutionally permissible to the extent that they serve important governmental objectives. . .and are substantially related to achievement of those purposes." *Metro Broadcasting*, 497 U.S. at 564-65.[15]

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[15] Here, Congress and the President determined the need for societal equality in contracting opportunities. *See*, *supra*, page 13, 14 & note 7. Thus, the concern expressed by the dissent in *Metro Broadcasting* over the majorities' "benign race conscious" language

In its Petition for Writ of *Certiorari*, Petitioner suggests that the use in *Metro Broadcasting* of intermediate scrutiny did not command a majority of the Court. Petition at 12. This is simply incorrect. Justices White, Marshall, Blackmun, and Stevens joined the opinion of Justice Brennan. *Metro Broadcasting*, 497 U.S. at 552. Petitioner suggests that Justice Stevens' concurring opinion set forth a different standard of review than that used by Justice Brennan. Petition at 12 & n.11. Petitioner fails to note that at the end of Justice Steven's concurrence, he stated "I join both the *opinion* and the judgment of the Court." *Metro Broadcasting*, 497 U.S. at 601-602 (STEVENS, J., concurring) (emphasis added).

Due to the proximity in time between the decision in *Metro Broadcasting* and the instant action, the fears embodied by the doctrine of *stare decisis* are magnified. In her discussion of the doctrine, in *Casey*, Justice O'Connor examined the overruling of *Lochner v. New York*, 198 U.S. 45 (1905), by *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), and the overruling of *Plessy v. Ferguson*, 163 U.S. 537 (1896) by *Brown v. Board of Education of Topeka, Shawnee County, Kansas*, 347 U.S. 483 (1954). *Casey*, 112 S. Ct. at 2812-813 (O'CONNOR, J., for the Court). Justice O'Connor found, among other factors, that in the

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remains inapplicable in the instant action. *See* Metro Broadcasting, 497 U.S. at 602 (O'CONNOR, J., dissenting).

distance in time between the overruled cases to their respective replacements societal conditions had changed significantly. *Casey*, 112 S. Ct. at 2813. In the instant action, Petitioner puts forward no arguments even hinting at changed conditions. Indeed, how much can the texture of federal acquisition and licensing law change in four years. Because the Court should not examine "each issue afresh in every case that raised it,"[16] changing the established level of scrutiny after only four year remains inappropriate. Accordingly, Petitioner's challenge to the Rebuttable Presumption must fail.

CONCLUSION

The judgment of the United States Court of Appeals for the Tenth Circuit should be affirmed.

Respectfully submitted.

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December 1994

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[16] Planned Parenthood of Southeastern Pennsylvania v. Casey, 112 S. Ct. 2791, 2808 (1992) (O'CONNOR, J.) (citing B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 149 (1921)).

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QUESTION PRESENTED

I. WHETHER THE IMPLEMENTATION OF A NARROWLY TAILORED AND VOLUNTARY INCENTIVE CLAUSE IN THE PROCUREMENT PROCESS IS A PROPER EXERCISE OF THE GOAL AND OPPORTUNITY PROVISION OF SECTION 502 OF THE SMALL BUSINESS ACT AND CONSTITUTIONALLY PERMISSABLE?

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No. 93-1841

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

ADARAND CONSTRUCTORS, INC.,
Petitioner,

v.

FEDERICO PEÑA, Secretary of Department of Transportation; THOMAS D. LARSEN, Administrator of the Federal Highway Administration; LOUIS N. MACDONALD, Administrator Region VIII of the Federal Highway Administration; and JERRY BUDWIG, Division Engineer of the Central Federal Lands Highway Division,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF AMICI CURIAE OF THE NATIONAL BAR ASSOCIATION AND THE COUNCIL OF 100-AN ORGANIZATION OF BLACK REPUBLICANS, INC. IN SUPPORT OF RESPONDENTS

CONSENT OF THE PARTIES

Petitioner and Respondent have consented to the filing of this brief.

INTEREST OF AMICI CURIAE

The National Bar Association (NBA) was founded in 1925. It is an organization comprised of over 20,000 African American lawyers who are located across the United States and the world. The NBA's mission is to promote social justice for improvement of the education, societal and

economic welfare of African Americans and other socially and economically disadvantaged Americans.

The Council of 100-An Organization of Black Republicans, Inc. was founded in 1974. The Council is a nonprofit, national association of African American Republicans headquartered in Washington, D.C., with members throughout the United States. The objectives of the Council are, *inter alia*, to disseminate information and mobilize support for traditional Party principles and ideas regarding economic empowerment, tolerance and inclusion, and fiscal responsibility.

STATEMENT OF THE CASE

Amici adopts the Statement of the Case as presented by Respondent.

SUMMARY OF THE ARGUMENT

Congress, through the Small Business Act, requires the Executive Branch to use its purchasing power to foster the development of small businesses, including small businesses owned and controlled by socially and economically disadvantaged persons. *See generally* 15 U.S.C. §631 (Declaration of Policy)(the "Act"). The Act requires annual, government-wide goals to be set for purchases of supplies and services from small business enterprises and small disadvantaged business enterprises (DBEs), and sets a floor for the DBE procurement goal. The statutory definition of DBE includes, but is not limited to a racial component. Not exclusively race-based, the eligibility standards includes persons who have been subjected to "ethnic prejudice or cultural bias."

Amici argue that Congress has broad powers to enact such legislation and to delegate authority to the Executive Branch to implement its will; and that in delegating such authority, the Act is unambiguous about its intent to create

constitutionally permissible "goals and opportunities" for small business enterprises and socially and economically disadvantaged business enterprises. Amici argue that the use of a remedial expedient, the Subcontracting Compensation Clause ("SCC"), by Respondent to achieve the purposes of the Small Business Act, as amended, and supplemented by essential appropriation acts and procurement policies, comport with the will of Congress and do not violate the nondelegation rule. All government actions were within the scope of its authority, and lawful.

Further, Amici argue that the SCC, a mere remedial expedient inviting a private act for a valuable government privilege, does not compel any private act for the valuable government privilege. We emphasize that under the SCC, no government action is unbound, no governmental obligation vests, no liability of the government or prime contractor is created until the prime contractor is selected and thereafter exercises its sole discretion to accept the invitation of offer set forth by the terms of the SCC. Amici submit that the selection of the DBE by Mountain Gravel & Construction Company in the exercise of its discretion under the SCC, objected to by Petitioner was a private act, not a cognizable action for the valuable government privilege under the Equal Protection Clause of the Fifth Amendment to the U.S. Constitution.

Alternatively, Amici argue that the remedial expedient, SCC, as narrowly tailored by its own terms and the policies of the Executive Branch is as permissible as the set-aside program upheld by the Court in *Fullilove v. Klutznick*,[1] and its progeny.[2] We submit that the proper scope of judicial review adopted in *Fullilove* is the controlling precedent in this case, if the constitutional guarantee claimed by Petitioner is a cognizable state action.

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[1] 488 U.S. 448 (1980).

[2] *See, e.g., Metro Broadcasting v. FCC*, 497 U.S. 547 (1990).

The SCC is just what it explains itself to be: a clause of a federal procurement contract which *invites offers, subject to acceptance*,[3] for monetary compensation "for awarding subcontracts to small business concerns owned and controlled by socially and economically disadvantaged individuals."[4] The invitation for offer is made as part of the procurement process which lets contracts under a bidding procedure established by the Federal Acquisition Regulation System ("FAR"),[5] and implements the acquisition-related section of various congressional statutes, including the Small Business Act.[6] Drawing on the opinion of the court below, on September 15, 1989, a division of the Department of Transportation Central Federal Lands Highway Division ("CFLHD"), awarded a $1-million-plus prime contract to a small business contractor (Mountain Gravel & Construction Company), for a federal highway project in Colorado known as the West Dolores project.[7] Amici understand that Mountain Gravel was bound to fulfill the mandatory terms of the contract which had been awarded to it. However, the SCC remained in a state of equipoise, as a continuing contractual incentive, which, according to its terms would either vest, or be rejected solely within the sole discretion of Mountain Gravel. Hence, acceptance of the terms of the

[3] RESTATEMENT (SECOND) OF CONTRACTS, §24, defines an offer as "a manifestation of willingness to enter into a bargain so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it." An invitation to offer in government contracts need not be accepted, but the power of acceptance permits the offeree to transform the offer into a contractual obligation. *See* ARTHUR L. CORBIN, *Offer and Acceptance and Some of The Resulting Legal Relations*, 26 Yale L.J. 169, 181-182, 199-200 (1917).

[4] *Adarand Constructors, Inc. v. Pena*, 16 F.3d 1537, 1541 (10th Cir.) *cert. granted*, 63 U.S.L.W. 3255 (U.S. Sept. 26, 1994)(No. 93-1841).

[5] *See* Record at 000110, *Adarand*, 16 F.3d 1537.

[6] Pub. L. No. 95-507, 92 Stat. 1771, 15 U.S.C. §631, *et seq.*

[7] *Adarand*, 16 F.3d at 1541.

continuing offer incentive was voluntary and premised on a condition precedent: compensation could be awarded to Mountain Gravel, on condition that it accept the invitation to offer by awarding a relevant subcontract to small business concerns owned and controlled by socially and economically disadvantaged individuals,[8] denominated as DBE.

The bidding process went forward to subcontract for the guardrail systems. Petitioner and a certified DBE[9] responded to the government's invitation to offer. Mountain Gravel, acting on the continuing offer under the SCC, awarded the subcontract to the DBE. Petitioner is before the Court claiming that the above described optional incentive program (SCC) is constitutionally impermissible because it violates the Equal Protection clause of the Fifth and Fourteenth Amendments to the U.S. Constitution.[10]

I. THE SCC AND DBE ELIGIBILITY REQUIREMENTS COMPORT WITH THE SMALL BUSINESS ACT AND, AS IMPLEMENTED, VIOLATE NEITHER THE NONDELEGATION RULE, NOR IS BEYOND THE SCOPE OF AUTHORITY RULE AND IS OTHERWISE CONSTITUTIONALLY PERMISSIBLE

The judicial principle undergirding the nondelegation rule permits Congress to delegate, by statute, or amendment, the authority to implement the will of

[8] *Id.*

[9] "The record gives no indication of the racial composition Adarand's ownership, although its general manager is a white male and its stockholders include the general manager's wife and two other women." *Id.* at 1542 n.8.

[10] *Adarand*, 16 F.3d 1537, *cert. granted*, 63 U.S.L.W. 3255 (U.S. Sept. 26, 1994)(No. 93-1841).

Congress. The nondelegation rule[11] is an old rule and an important one because the people depend on this rule to assure that Congress does its work. Hence, when Congress delegates its authority to a legislative agency,[12] a judicial unit,[13] or to an arm of the Executive Branch,[14] the text of the organic or amending act is required to establish general policy or standards to guide the delegate in the creation of tools to fill in the blanks to enable the delegate to fulfill the will of Congress in an efficient and effective manner, as an administrative function.[15]

This process enables Congress, in an exceedingly complex nation, in which there exist ongoing conflicting interests, to carry out, to fund, correct, amend or repeal, its actions on behalf of the people.[16] The delegation process permits needed elasticity--as guided by Congress--by federal agencies to implement, correct, create, amend or repeal administrative actions, or to use appropriated funds in an exceedingly complex nation toward the resolution of conflicting interests. The delegation process and the incidental funding process is a means by which Congress reinforces its responsibilities incident to representation,[17] one

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[11] *See Cargo of Brig Aurora v. U.S.*, 11 U.S. 382 (1813).

[12] *Humphrey's Executor v. U. S.*, 295 U.S. 602 (1935).

[13] *Mistretta v. U. S.*, 488 U.S. 361 (1989).

[14] *U. S. v. Touby*, 909 F.2d 759 (3d Cir. 1990), *aff'd* 111 S.Ct. 1752 (1991).

[15] *Id.*

[16] *Id.*

[17] *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316 (1819), stating, "The people of all the States have created the general government and have conferred upon it the general power of taxation. The people of all the States, and the States themselves, are represented in Congress, and, by their representatives, exercise this power." *Id.* at 435. Amici's search of the record does not show the absence of support for the Small Business

that the Court has by tradition given deference, and shunned countermajoritarian intervention.[18]

In this case, Petitioner seeks the reversal of a decision which rejected Petitioner's claim that the terms of Section 502 of the Small Business Act of 1988, do not authorize the implementation of a remedial expedient contractual clause used by the Department of Transportation ("DOT") to carry out the will of Congress to provide potential opportunities for DBEs to minimally share in the wealth of their nation. Petitioner makes this argument because his company was not selected as a subcontractor under the instant contract which contained a clause providing for a non-mandatory incentive allowing the prime contractor to select a disadvantaged business enterprise ("DBE") to build a guardrail at the West Dolores Project in the State of Colorado. The prime contractor is White and the DBE is one of the following socially and economically disadvantaged Americans: Black American, Hispanic American, Asian-Pacific American or Subcontinent-Asian American. 15 U.S.C. §637 (d)(3)(C).[19]

Act programs enacted in 1978 or 1988 by any member of the Senate or House representatives from the State of Colorado. However, even if there had been, it would not have undermined the reinforcement of the will of Congress to enact such a law.

[18] *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)(an agency's pronouncements will be given great deference, even, and particularly when the underlying statute is ambiguous).

[19] As pointed out by the court below:

> STURAA, and previously STAA, define "socially and economically disadvantaged individuals" with reference to the Small Business Act. 15 U.S.C. §637(d). Under the Small Business Act, a small business must be at least 51% owned and controlled by individuals who are socially and economically disadvantaged. *Id.* Members of certain minority racial and ethnic groups and women are presumed socially and economically disadvantaged. *Id.* That presumption is rebuttable under the DBE criteria incorporated into CFLHD's SCC

But, under the SCC and the scheme under attack in this case, the prime contractor could have selected a White DBE, if it qualified as being socially and economically disadvantaged. 15 U.S.C. §637 (a) *et seq*.

Section 502 of the Small Business Act, Pub. L. No. 100-656, 102 Stat. 3881 (codified as amended in 15 U.S.C. §644(g)) states:

> The President shall annually establish Government -wide goals for procurement contracts awarded to small business concerns and small business concerns owned and controlled by socially and economically disadvantaged individuals. The Government-wide goal for participation by small business concerns shall be established at not less than 20 percent of the total value of all prime contract awards for each fiscal year. The Government-wide goal for participation by small business concerns owned and controlled by socially and economically disadvantaged individuals shall be established at not less than 5 percent of the total value of all prime contract and subcontract awards for each fiscal year. Notwithstanding the Government-wide goal, each agency shall have an annual goal that presents, for that agency, the maximum practicable opportunity for small business concerns and small business and

program. Both minority- owned (DBEs) and women-owned small business enterprises (WBEs) may be decertified if it can be established that they are not socially and economically disadvantaged. Non-minority-owned small businesses also are eligible for DBE certification by the Small Business Administration, provided that they satisfy the same eligibility minority-owned small business.

See 15 U.S.C. §637(a)(*citing* Surface Transportation Uniform Relocation Assistance Act, Pub. L. No. 100-17, 101 Stat. 144 §106(c) (1987); Surface Transportation Assistance Act, Pub. L. No. 97-424, 96 Stat. 2100 §105(f)); *see also Adarand*, 16 F.3d at 1541 (internal footnote omitted).

> economically disadvantaged individuals to participate in the performance of contracts let by such agency.

Section 502, as required under the delegation rule, contains goals to be established by the agency delegates. Textually, it mandates the establishment of government-wide goals at not less than 20% for small businesses and not less than 5% for disadvantaged businesses. Although a government-wide goal is accentuated, the text clearly and plainly guides the agency delegate toward annually discretionary goals that reflect the "maximum practicable opportunity" for DBEs to participate in the federal procurement contracting process.[20] The text of 502 establishes the President's authority and the criterion to govern the President's course. Section 502 directs: "The Administration and the Administrator of the Office of Federal Procurement Policy shall, when exercising their authority pursuant to paragraph (2), insure that the cumulative annual prime contract goals for all agencies meet or exceed annual Government-wide prime contract goal established by the President pursuant to this paragraph."[21]

The language of the Act is embracing, but is specifically canal by practicability, realism, cooperative, and limited government, and ultimately, private judgement. As first codified, the limitations expressed in the Act guide the "[SBA] and the head of each Federal agency" to assure that the goals "shall realistically reflect the potential of small

[20] No sanctions exist in law against any government agency if the goal and opportunity provision of Section 502 is not reached. All that is required is an explanation to Congress justifying the shortfall, if any, of the goal. *Adarand*, 16 F.3d at 1541 (*citing* 15 U.S.C. §644(h)). However, the reporting provision is important because it demonstrates Congress's continuous concern and need to know the reason why the goal and opportunity provision of Section 502 is not being met. In is in such reports that a department, such as DOT, could report to Congress that prime contractors are not responding to the government's invitations under the SCC.

[21] *Adarand*, 16 F.3d at 1540 n.3.

business concerns and small business concerns owned and controlled by socially and economically disadvantaged individuals to perform such contracts and to perform subcontracts under the contracts."[22] The text of 502 is neither vague or unintelligible. To the contrary, it is clear, plain and intelligible, despite Petitioner's claim that the term "goal" has no substantive meaning in Section 502.[23] Strangely, Petitioner does not link a second operative word that has significant meaning in remedial legislation. The word is "opportunity." Repetition of a portion of Section 502 demonstrates the point: "Notwithstanding the Government-wide goal, each agency shall have an annual goal that presents...the maximum practical opportunity" for small businesses and concerns owned and controlled by socially and economically disadvantaged individuals...." 15 U.S.C. §644(g). The word "opportunity" has a meaning which, in the context of the word "goal", are both quite clear standards.

Three dictionaries covering a period of nearly one hundred years make the case for a meaning that is more than descriptive. The word opportunity is an active word. The

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[22]15 U.S.C. §644(g)(2).

[23]Petitioner's Reply Brief at 5, *Adarand*, 16 F.3d 1537. To conclude that the term has no substance is to belie the manner in which the word is used in the context of Section 502. Its meaning and the substance of its meaning must be read in the light of the context of the Act. Many words isolated from other words may not have an intelligible meaning, but that is not the case here. Reference to leading dictionaries aid Amici's view that the word goal has meaning and purpose. The 1899 edition of the UNIVERSAL DICTIONARY OF THE ENGLISH LANGUAGE 2337 (Robert Hunter and Charles Morris eds. 1899), defines the terms goal as "The final purpose or aim; the end at which a person aims, or to which a design is directed; the end. The 1945 edition of WEBSTER'S NEW INTERNATIONAL DICTIONARY UNABRIDGED 1071 (2d ed. 1945), defines goal as "[T]he end to which a design tends; aim; purpose...to seek, reach...a goal...." THE WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 972 (Philip Babcock Grove ed. 1986), defines goal as "The end toward which effort...is directed."

1899 edition of the UNIVERSAL DICTIONARY OF THE ENGLISH LANGUAGE 3335, defines "opportunity" as "Fit, opportune, or convenient times..., a...suitable or propitious occasion or chance.[24] The 1948 edition of WEBSTER'S NEW INTERNATIONAL DICTIONARY OF ENGLISH AND LANGUAGE UNABRIDGED defines "opportunity" as "a time or place favorable for executing a purpose; suitable combination of conditions; suitable occasion; chance." The 1986 version of WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY defines "opportunity" as "a combination of circumstances, time and place suitable or favorable for a particular activity or action...an advantageous circumstance or combination of circumstances, esp. when affecting security, wealth, or freedom (as from constraint)...a time, place, or condition favoring advancement or progress...SYN OCCASION, CHANCE, BREAK, TIME: OPPORTUNITY indicates a combination of circumstances facilitating a certain action or inviting a certain decision...."[25] Amici assert that when the terms "goal" and "opportunity" are read in the context of the remedial purpose of the Act, there is no basis to Petitioner's claim that Congress gave no substantive guidance, or imposed no limitations, on federal agencies in carrying out congressional will under Section 502. Clearly, federal agencies could reasonably interpret that Congress expected these agencies, in the exercise of their discretion, and within the plain meaning of the terms of the Act, to create "a combination of circumstances facilitating a certain action or inviting a certain decision."[26] Amici agree with Justice Frankfurter's opinion that "[a] problem in statutory construction can seriously bother courts only when there is a contest between probabilities of meaning,"[27] which is absent in this case.

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[24]*Id.* (UNIVERSAL DICTIONARY).

[25]*Id.* (NEW INTERNATIONAL DICTIONARY).

[26]*Id.* (THIRD NEW INTERNATIONAL DICTIONARY).

[27]FELIX FRANKFURTER, *Some Reflections on the Reading of Statutes*, in ESSAYS ON JURISPRUDENCE FROM THE COLUMBIA LAW REVIEW 43, 44 (1963).

II. THE SCC IS A CONSTITUTIONALLY PERMISSIBLE, NON-MANDATORY POTENTIAL REMEDIAL DEVICE TO IMPLEMENT SECTION 502, THROUGH THE PROCUREMENT PROCESS TO ACHIEVE THE WILL OF CONGRESS

At the Department of Transportation, the SCC was that certain non-mandatory contractual incentive to attempt to implement the "specific goals and practical opportunities provision" of Section 502,[28] supported by the weight of the legislative history, and the 1988 amendments to the Small Business Act, introduced as S. 1993, and H.R. 1807.[29] The

[28] As the legislative history of Section 502 shows, Congress mandates a government-wide procurement goal of no less than 20% for small business, and no less than 5% for DBEs. *See* H. R. CONF. REP. No. 1070, 100th Cong., 2d Sess. 73 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5401, 5507, which states that "each procuring agency is required to establish a similar goal consistent with its mission, and such goals shall not be less than the government-wide goal established by the President."

[29] That members of Congress were both aware and concerned about the dearth of minority participation in the commerce of the nation is demonstrated by the testimony of Sen. Sasser in connection with S. 1993 and H.R. 1807, who said:

> Minorities are still less likely to own a small business. Some 1.8% of the minority population owned a business in 1982 compared with 6.4 percent of all business owners. Moreover, minority-owned firms are smaller than nonminority businesses with lower sales and fewer employees...The question of minority business ownership is one that demands continued attention by this committee and by the entire Congress...These hearings and the Chairman's legislative proposal...are an effort to get the 8(a) program to focus on its original statutory objective. That objective is simply enough--to boost minority ownership of small businesses that can compete in a competitive market.

Minority Business Development Program Reform Act of 1987: Hearings on S. 1993 and H.R. 1807, Before the Senate Committee on Small Business, 100th Cong., 2d Sess. 15-18 (1988)(emphasis added).

During these hearings, Sen. Kerry's testimony also is

Department of Transportation, and its competent modes, responsible for carrying out the will of Congress, were aware of the statements of Sen. Bumpers, who co-sponsored S. 1993 and H.R. 1807 for the creation of goals for DBE participation under the federal procurement process.[30] The testimony of Cong. Conte, Cong. LaFalce, and Sen. Weiker could not be discounted by DOT modes in fashioning the SCC relative to DBEs,[31] particularly in light of congressional

instructive. Sen. Kerry testified that "100 firms in the [Section 8(a)] program received almost 55 percent of the $3.1 billion in 8(a) procurement, [that] [n]early 1,500 firms were forced to split the remaining contracts available, and [that] more than 1,500 firms got absolutely nothing at all." *Id.* at 8.

During these hearings, Sen. Levin, focussing on the word opportunity, testified that the 8(a) programs provides "important business opportunities to members of our society who have been denied such opportunities." *Id.* at 189 (the reason why the 8(a) programs needed improvement against fraud).

The government-wide concern of Congress relative to the plight of minority enterprises and the federal government's contracting processes has been the concern of both Republican and Democratic administrations. *See, e.g., Minority and Small Business Contracting Policies of the Agency of the House Comm. on International Relations*, 95th Cong., 1st Sess. 53, 64 (1977)(testimony of Timothy L. Jenkins).

These hearings and the legislation that ensued demonstrate the continuing concerns of Congress to expend the government's funds in a way to provide opportunities for minority participation. Even short of the specific concerns expressed in the hearings, Congress is better equipped to make assumptions and draw the same conclusion because the collective assumptions of the representative branch is not done without presumed Member scrutiny. This is no doubt why in the *Fullilove* decision, "it was within Congressional power to act on the *assumption* that in the past some non-minority businesses may have reaped competitive benefit over the years from the virtual exclusion of minority firms from these contracting opportunities." *Fullilove*, 448 U.S. at 485 (Burger, C.J.)(emphasis added).

[30] 134 CONG. REC. 31491-31492 (1988).

[31] 134 CONG. REC. 30057 (1988)(Cong. Conte highlighted the President's Report on the State of Small Business: that "[b]usiness ownership as a

hearings revealing the continuing present difficulty facing minority firms and past discrimination.[32]

The legislation that Congress enacted is reflective of its concerns in both the organic Small Business Act and the two transportation funding authority acts (STAA and STURAA) and is reflective of its investigation into the dearth of and discrimination against DBEs. The enactment of 502 of Small Business Act in 1988 demonstrates continuous concerns by Congress about the plight of minority and small businesses in the free market doing business with the government. These concerns also were expressed in the 1978 amendments to the Small Business Act, with the enactment of Section 221, Pub. L. No. 95-507, 92 Stat. 1770. This law requires federal agencies, in cooperation with the Small Business Administration, to establish "realistic goals" for DBE opportunities in federal government contracts in excess of $10.000,[33] and no limitation exist in the law or Section

percent of the population is 1.8 percent for all minorities versus 6.4 percent nationwide[; and that] while minorities comprise 22 percent of the national population, they account for approximately 6 percent of government dollars [demonstrating the need for continued efforts in support of [DBEs]." *Id.* *See also* 133 CONG. REC. 33314-33316 (1987)(statement of Cong. LaFalce); 134 CONG. REC. 31493 (1988)(statement of Sen. Weicker).

[32] *See, e.g., Hearings on Federal Contracting Opportunities for Minority and Women-Owned Businesses: An Examination of the 8(d) Subcontracting Program, Before the Senate Committee on Small Business*, 98th Cong., 1st Sess. (1983); *Hearings on the State of Hispanic Small Business in America, Before the Subcommittee on SBA and SBIC Authority, Minority Enterprise and General Small Business Programs of the House Committee on Small Business*, 99th Congress, 1st Sess. (1985).

[33] Supporting testimony of Sens. Glenn and Heinz establish a continued historic truth: that minority businesses were not more than 4% of the total number of businesses in the U.S. with not over 1% of the total business. 124 Cong. Rec. 29641 (Sen. Glenn), 29644 (Sen. Heinz)(1978). The continuous concerns of Congress appear in several hearings on a host of issues relative to small and minority firms. *See, e.g., To Amend the Small Business Act to Extend the Current SBA 8(a)*

502 which would cut off the authority exercised by CFLHD.[34]

Drawing on the opinion of the court below, on September 15, 1989, CFLHD awarded a $1-million-plus prime contract to a small business contractor (Mountain Gravel & Construction Company), for a federal highway project in Colorado known as the West Dolores project.[35] Amici understand that Mountain Gravel, a non-governmental entity, was bound to fulfill the mandatory terms of the contract which had been awarded to them. However, Amici assert that the SCC remained in the state of dormancy until the prime contractor elected to act on the terms of the clause. At this point compensation could be awarded to Mountain Gravel, on condition that it award a relevant subcontract to non-exclusive small business concerns owned and controlled by socially and economically disadvantaged individuals,[36] denominated as Disadvantaged Business Enterprises.

III. THE SCC SEEKS TO IMPLEMENT 502 OF THE SMALL BUSINESS ACT WHICH HAS BEEN A CONSIDERED DECISION OF THE PRESIDENCY

As in *Fullilove*, Section 502, and its implementing fabric has not only been a considered decision by Congress, but that of successive presidential administrations reaching back to Presidents Eisenhower and Nixon and forward to

Pilot Program: Hearings on H.R. 5612 Before the Senate Select Committee on Small Business, 96th Cong., 2d Sess. (1980); *Small and Minority Business in the Decade of the 1980s, Part 1, House Committee on Small Business*, 97th Cong., 1st Sess. (1981); *Hearings on Minority Business and its Contributions to the U.S. Economy, Senate Committee on Small Business*, 97th Cong., 2d Sess. (1982).

[34] *See, e.g., Touby*, 909 F.2d at 769.

[35] *Adarand*, 16 F.3d 1537.

[36] *Id.*

President Clinton. In some measure, each of these administrations have attempted "to strive to eliminate obstacles to the growth of small business."[37] In 1983, President Reagan signed an Executive Order requiring federal agencies to establish objectives for encouraging prime contractors to utilize minority enterprises. The Reagan administration's program also required each federal agency to develop programs that would give prime contractors incentives to use minority business subcontractors.[38] In this area, the Reagan administration's program and President Carter's policy efforts were compatible.[39]

Likewise, President Clinton's policies have continued the policy direction of past administrations regarding efforts by the Executive Branch to set goals and to provide opportunities for DBEs, as prime and subcontractors to have "a fair opportunity to participate in Federal procurement."[40] The SCC is such a goal and opportunity.

IV. THE DECISION OF THE PRIME CONTRACTOR TO ACTIVATE THE SCC CLAUSE AND THE ENSUING OFFER AND ACCEPTANCE BY THE PRIME CONTRACTOR AND SUBCONTRACTOR IS A PRIVATE ACT

[37]Exec. Order No. 11,518, 35 Fed. Reg. 4,939 (1970). Of course, the reach of presidential power to aid black people to compete in the nation reaches back to 1863, with the signing of the Emancipation Proclamation. *See* THEODORE CROSS, THE BLACK POWER IMPERATIVE: RACIAL INEQUALITIES AND THE POLITICS OF NONVIOLENCE 799-805 (1984).

[38]Exec. Order No. 12,432, 48 Fed. Reg. 32, 551 (1983).

[39]Exec. Order No. 12,190, 45 Fed. Reg. 7773 (1980).

[40]Exec. Order No. 12,928, 59 Fed. Reg. 48,377 (1994).

Amici assert that the selection of the DBE was a private action[41] and not a state action implicating either the Fourteenth or Fifth Amendments to the U.S. Constitution. The choice to act on the continuing invitation under the SCC was not a governmental action.

The bidding process went forward by Mountain Gravel to subcontract for the guardrail systems. Petitioner and a certified DBE[42] responded to the invitation to offer and Mountain Gravel, acting on the continuing invitation under the SCC, independently, without compulsion, and by private action, awarded the subcontract.

If Mountain Gravel had not acted on the continuing invitation, the DBE would, we think, absent some common law right of action, have no standing, or a federal right of action against Mountain Gravel or the DOT to compel Mountain Gravel to act on the SCC, (unless there exist a federal private right of action). Nor would the DBE have had a right of action under the Fifth Amendment to enjoin Petitioner from being selected to build the guardrail, if Petitioner had been the choice of the prime contractor as the subcontractor.

Hence, this case is not like the segregation case in the District of Columbia where the state compelled the action held to be a denial of equal protection under the Fifth Amendment.[43] The fact that the SCC was an incentive to implement the goal and opportunity provision of Section 502, cannot be determined (short of speculation) that

[41]Amici can agree with Petitioner's concession to the extent that it asserts that "a private individual...has made the decision to issue a subcontract..." Brief of Petitioner at 20, *Adarand*, 63 U.S.L.W. 3255.

[42] "The record gives no indication of the racial composition Adarand's ownership, although its general manager is a white male and its stockholders include the general manager's wife and two other women." *Adarand*, 16 F.3d at 1542 n.8.

[43]*Bolling v. Sharpe*, 347 U.S. 497 (1954).

Mountain Gravel considered it to be in its best business interest only to select a DBE.[44] Other market place and efficiency considerations could logically influence a prime contractor's discretion to avoid the incentive allowing compensation for providing "direct assistance to disadvantaged subcontractors in acquiring necessary bonding, obtaining price quotations, analyzing plans and specifications, and planning and management of the work."[45] Where, as here, the prime contractor is free to accept, or not to accept the invitation under the SCC, the government is a mere bystander at this point in the same manner that it is a bystander in waiting, if, and until, the prime contractor decides to exercise the power of acceptance under the terms of the SCC. Amici submit that it is because Congress may not always compel private actions in the market place that it may create incentives which may cause an actor to act on its own in ways that the government may be constrained to do.[46]

Even if it is the view of Petitioner that the SCC is a compulsory and not a discretionary clause, a prudential burden rest upon Petitioner to demonstrate that an injury in fact is a direct causal result of more than a *perceived*[47]

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[44]*See* Record at 000035, *Adarand*, 16 F.3d 1357 (the SCC clearly shows the wide range of discretion in the SCC, as well as second tier discretion of subcontractors to contract with whom they wish. As the text of the SCC clearly and unambiguously shows, there is no government compulsion at any tier.).

[45]*Id.* at 000035 (the SCC).

[46]The history of Amici in the country clearly shows that the government cannot prevent the private acts of prime contractors from discriminating in public procurement, and "[e]ven if [it] could...discrimination in private commercial transactions undermines the ability of minority firms to qualify as suitable prime contractors or subcontractors on government contracts." ROBERT E. SUGGS, *Rethinking Minority Business Strategies*, 25 HARV. C.R.- C.L. L. REV. 101, 114 (1990).

[47]Amici notes that the only evidence Mountain Gravel's state of mind is that it "felt compelled to give the subcontract of the guardrail work to Gonzales Construction." Brief of Petitioners at 10-11, *Adarand*, 63

compulsory government action.[48]

U.S.L.W. 3255. Respectfully, it is submitted that if today African-Americans cannot perceive racism when the history of the country and certain localities acted upon it; Petitioner (through Mountain Gavel's) claim about how Mountain Gravel "felt" ought not to be weighted in fact to validate a perception of racism when none is present in the SCC about which Petitioner complains. See *Podberesky v. Kirwin*, No. 93-2527, slip op. at 8-9 (4th Cir. Oct. 27, 1994). The history of advantage is as relevant as history of disadvantage and racial denial as written in history books. *Id.* at 8.

[48]*Id.* at 115; Record, *supra* note 44. The Court has recently stated that "`[t]he mere fact a business is subject to state regulation does not by itself convert its action into that of the State for purposes of the Fourteenth Amendment...The complaining party must...show that `there is a sufficiently close nexus between the State and the challenged action of the regulated party entity so that the action of the latter may be fairly treated as that of the State itself.'" *Blum v. Yaretsky*, 457 U.S. 991, 1004-05 (1982)(internal citation omitted). The Court added that "Second, although the factual setting of each case will be significant, our precedents indicate that a State normally can be held responsible for a private decision only when it has exercised coercive power, or has provided such significant encouragement, either overt or covert., that the choice must in law be deemed to be that of the State...Third, the required nexus may be present if the private entity has exercised powers that are `traditionally the exclusive prerogative of the State." *Id.* It is submitted that the SCC is a mere remedial expedient inviting a private act for a valuable government privilege. By its terms, it is not a coercive device, and is proper device in furtherance of the Spending Clause of the Constitution. *Fullilove*, 448 U.S. at 474. Nor, in the exercise of its discretion, is the prime contractor required to "exercise powers that are `traditionally the exclusive prerogatives of the State.'" *Blum*, 457 U.S. at 1005. Thus, no state action is involved when a SCC is merely included in a federal contract inviting an offer to do a discretionary, future act, if exercised. *See Valley Forge College v. Americans United*, 454 U.S. 464, 473 (1982); *Allen v. Wright*, 468 U.S. 737, 751, 753 (1984); *Lujan v. Defenders of Wildlife*, 504 U.S. ____, 112 S.Ct. 2130 (1992), regarding prudential limits.

Finally, it is submitted, the organic statute, appropriation acts and implementing procurement policy (SCC) under the delegation doctrine appear to be equally as constitutional in substance and methodology as government regulations that limit funds to state agencies that encourage or promote abortion as a method of family planning. *See Rust v. Sullivan*, 500 U.S. 173 (1991).

V. THE SCC PROGRAM IS SO NARROWLY TAILORED THAT IT TRAMMELS NOT ON THE RIGHTS OF WHITES

A critical question posed by this case, *sub judice*, is whether the Constitution prohibits Congress and the Executive Branch from exercising its broad delegation of power (and the receipt thereof) that result in the a remedial expedient that does not trammel on the rights of White people?

Petitioner has stipulated "that Section 502 satisfies the evidentiary requirements of [*Fullilove v. Klutznick*]."[49] Hence, Amici now focuses more critically on whether a remedial expedient, such as the SCC, used by DOT, is narrowly tailored to achieve the remedial purpose of Section 502. Amici submit that the SCC is not only narrowly tailored, but is more fined tuned than the program appropriately upheld in *Fullilove*.

Congress passed the Public Works Employment Act of 1977 which provided financial assistance to build public facilities. The Act required that absent an administrative waiver, 10% of the funds granted for the projects had to be used to procure services or supplies from minority business enterprises ("MBEs"). Under the program, the grantees and their prime contractors, were required to seek out all available, qualified, *bona fide* MBEs. MBEs could be awarded the set-aside even though their bids were not the lowest, and responsive bid--so long as the higher bids when challenged, were found to reflect merely attempts to cover costs inflated by the present effects of prior disadvantaged and discrimination. A grantee under the program could waive the set-aside. A complaint procedure existed under the program to assure that only *bona fide* MBEs participated therein.

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[49] *Adarand*, 16 F.3d 1546.

The Petitioner in *Fullilove* sued alleging that this congressionally created program violated the Fourteenth and Fifth Amendments to the U.S. Constitution. They challenged the program on three grounds: (1) that the set-aside program was invalid on its face; (2) that the MBE program deprived nonminority business of access to at least some portion of the government contracting opportunities generated by the Act; and (3) that Congress made no findings to support the need for the set-aside provision.

The Court rejected all of these claims. First, the Court determined that Congress is a competent and the most qualifies body to determine the remedial needs of its citizens, even when the remedy is based on race-conscious criteria.[50] Secondly, the Court determined that "when effectuating a limited and properly tailored remedy to cure the effects of prior discrimination, such a 'sharing of the burden' by innocent parties is not impermissible...The actual `burden' shouldered by nonminority firms is relatively light....."[51] Third, the Court determined that "Congress is not expected to act as though it were duty bound to find facts and make conclusions of law. The creation of national rules for the governance of our society simply does not entail the same concept of recordmaking that is appropriate to a judicial or administrative proceeding."[52]

Amici submit that if Petitioner in the instant case has been trammeled, such injury claimed must be within the four corners of the expedient that presumably is the subject

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[50] *Fullilove*, 448 U.S. at 483-484 .

[51] *Id.* at 484.

[52] *Id.* at 502 (Powell, J., concurring). *Id.* at 478 (Burger, C.J.). The Court also determined that "[I]t was within congressional power to act on the assumption that in the past some nonminority businesses may have reaped competitive benefit over the years from the virtual exclusion of minority firms from these contracting opportunities." *Id.* at 485 (Burger, C.J.).

matter of its claim. The remedial expedient is the SCC, which provides, in pertinent part:

> Section 108.--PROSECUTION AND PROGRESS [53]
>
> 108.01 Subcontracting. This subsection is supplemented to include a Disadvantaged Business Enterprise (DBE) Development and Subcontracting Compensation Provision as follows:
>
> Monetary compensation is *offered* [emphasis added] for awarding subcontracts to small business concerns owned and controlled by socially and economically disadvantaged individuals. A DBE shall mean a small business concern owned and controlled by socially and economically disadvantaged individuals as defined under the FAR Contract Clause 52.219-8 entitled "Utilization of Small Business Concerns Owned and Controlled by Socially and Economically Disadvantaged Individuals" or a woman owned business as defined under FAR Contract Clause 52.219-13.
>
> * * * *
>
> Compensation is provided to the Contractor to locate, train, utilize, assist, and develop DBEs to become fully qualified contractors in the transportation facilities construction field. The Contractor shall also provide direct assistance to disadvantaged subcontractors in acquiring necessary bonding, obtaining price quotations, analyzing plans and specifications, and planning and management of the work. The Contractor shall maintain records documenting these activities and shall make them available for Government review upon request.

[53] Appendix at I-25, *Adarand*, 16 F.3d 1537.

> If the DBE subcontractor subcontracts (2nd tier) all or part of its work to a non-DBE subcontractor, payment under this provision may be adjusted accordingly by the Engineer. The prime contractor may only receive compensation for that portion of subcontract work which is actually performed by DBEs. However, if the DBE subcontractor subcontracts only insignificant portions of the subcontract while still doing the major portion of the work, the prime contractor may receive full compensation under this provision.
>
> * * * *
>
> The Contractor will become eligible to receive payment under this subcontracting compensation provision when the dollar amount (based on final subcontracted amount) of the disadvantaged business enterprise subcontract(s) awarded exceeds 10 percent of the original contract amount.
>
> The Contractor will be paid an amount computed as follows:
>
> 1. If a subcontract is awarded to one DBE, 10 percent of the final amount of the approved DBE subcontract, not to exceed 1.5 percent of the original contract amount.
>
> 2. If subcontracts are awarded to two or more DBEs, 10 percent of the final amount of the approved DBE subcontracts, not to exceed 2 percent of the original contract amount.
>
> * * * *

The SCC is an instrument which invites the activation of a private party's own judgment rather than joint

or collective compulsion of it. Amici submit that the SCC is so narrowly tailored that it guarantees nothing to DBEs. Under the SCC, DBEs must wait for the activation of the SCC by prime contractors, such as Mountain Gravel, who for reasons of their own may or may not respond to the invitation of offer by the government to use a DBE as a subcontractor.[54] The SCC is self-tailored because it is neither mandatory or wrought with penalty. The intent of the government, clearly stated in the text of the SCC, is to invite the prime contractor to participate in the goal and opportunity program authorized by Section 502, and implemented by the selected remedial expedient. The decision not to use a DBE for whatever reason requires no justification or excuse by the prime contractor to be in compliance with the overall contract. The terms of the SCC are less demanding than the waiver provision that exists in *Fullilove*.[55] Here, the prime contractor is neither required to seek a waiver from, or to ask permission of the government to do anything prior to responding, or not responding to the invitation for offer under the SCC. The SCC creates no monopoly on government funds.[56] If a monopoly exist, it may be for the substantial expenditure of federal dollars to

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[54] A prime contractor is not guaranteed any additional compensation should the selected DBE then subcontract a portion of its work to a non-DBE. "The prime contractor may only receive compensation for that portion of subcontract work which is actually performed by DBEs." Appendix at I-25, *Adarand*, 16 F.3d 1537.

[55] *Fullilove*, 448 U.S. at 481-482 (opinion of Burger, C.J.).

[56] *Id.* at 532 (Stevens, J., dissenting). The SCC is no historical monument. It will teach Americans nothing about the costs associated with a sovereign's grant of exclusive privileges because, and it might surprise the population to discover, there are no sovereign exclusive guarantees to DBEs involved in this case. *Id.* What the SCC will teach is that DBEs must wait on prime contractors to decide if it is in their interests or the interest of the market place to activate the SCC. Clearly, under the SCC program, "the provision stigmatizes as inferior neither a minority firm that benefits from it nor a nonminority firm that is burdened by it." *Id.* at 521 (Marshall, J., concurring in judgment).

persons other than DBEs, the very opposite which undergirds the intent of Congress under of Section 502 of shared opportunity for wealth. Amici again emphasize that both Congress, and DOT leave this judgment, *a priori*, in the sole discretion of private parties.[57] Amici again note that the prime contractor is free to select DBE subcontractors who are White[58] and certified by any government agency. Hence, Amici, respectfully, requests the Court to ponder whether a claim under the Fifth Amendment would be cognizable if Mountain Gravel had subcontracted, under the self-tailored terms of the SCC, the work to a DBE that happened to be White as indeed it can.

Amici submits that any claim by Petitioner that it has been abused has been correctly rejected by the district court below, as affirmed by the decision of the Tenth Circuit herein on review. The Tenth Circuit's decision persuasively provides, we think, the most reasonable decisional direction for the Court take:

> The district court found that the challenged program satisfies *Fullilove* because it serves important governmental objectives and is substantially related to achievement of those objectives. 790 F.Supp. at 244. The district court concluded that the challenged program was narrowly tailored to achieve its statutory objectives because it does not mandate its provisions in an inflexible manner. It ensures minimum impact on non-DBEs because `[t]o qualify for DBE status a business must demonstrate, via the annual certification process, that it is a *bona fide*

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[57] *Id.* at 484 ("Failure of nonminority firms to receive certain contracts is, of course, an incidental consequence of the program, not part of its objective; similarly, past impairment of minority-owned access to public contracting opportunities may have been an incidental consequence of `business as usual' by public contracting agencies and among prime contractors.").

[58] *Adarand*, 16 F.3d 1541.

DBE, eligible to participate in the program. The annual certification mechanism is reasonably calculated to insure legitimate qualified participants, so that the program does not become overinclusive in the sense of tolerating abuse of the program by non-DBEs. Likewise the program is not underinclusive since it provides that businesses not entitled to the presumption of DBEs status may apply for certification and establish their qualifications to participate. *Id*.... Because eligibility is based on economic disadvantage, non-minority-owned businesses also are eligible to participate. The SCC program is not overinclusive since minority businesses that do not satisfy the economic criteria cannot qualify for DBE status. Furthermore, the SCC program is `appropriately limited in extent and duration' because federal procurement and construction contracting practices are subject to regular `reassessment and reevaluation by Congress.' *See Fullilove*, 488 U.S. at 489 (opinion of Burger, C.J.).[59]

V. CONCLUSION

In conclusion, Amici submit that Petitioner's attempt to invite the Court to divert its attention to *Richmond v. J.A. Croson*[60] as the standard for judicial review is misplaced because the facts are different,[61] the political racial makeup (apparently relevant in *Croson*) of the political decision makers is different,[62] the constitutional authority and the

[59] *Adarand*, 16 F.3d at 1546-1547. *See also Fullilove*, 448 U.S. at 486, 487-488, 490, 521.

[60] 488 U.S. 469 (1989).

[61] Paralleling a statement made by Justice Scalia in *Croson* relative to *Fullilove*, Amici do not believe that decision in *Croson* controls the appeal before this Court. *Id*. at 552.

[62] *Id. at* 495 (O'Connor, J.); *id*. at 553-554 (Marshall, J., dissenting).

assignment of power under our instrument of rule is different,[63] and the remedial expedient, the SCC, is different. Amici assert that the program involved in this appeal would have been upheld under less than strict scrutiny review if it had preceded the Court's decision in *Fullilove*.

Respectfully submitted,

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Amici, and the deep and rich history to which we are rooted, and the kaleidoscope of injustices that Amici and our ancestors have experienced supports our determination that there is something worthy of consideration in Professor Ely's words that require them to be spread on the record: "When the group that controls the decision making process classifies so as to advantage a minority and disadvantage itself, the reasons for being unusually suspicious, and, consequently, employing a stringent brand of review are lacking. A White majority is unlikely to disadvantage itself for reasons of racial prejudice; nor is it likely to be tempted either to underestimate the needs and secrets of Whites relative to those of others, or to overestimate the cost of devising an alternative classification that would extend to certain Whites the advantages generally extended to Blacks...." JOHN HART ELY, *The Constitutionality of Reverse Discrimination*, 41 U. CHI. L. REV. 723, 735-736 (1974). A careful reading of the facts of this case and the reality of the SCC program does not rise the level of undue disadvantage to Whites which would, we think, cause the Court to arouse the *Croson* decision and to transport it to the seat of the National Government.

[63] *Compare Fullilove, 488 U.S.* at 510 (Powell, J., concurring) with *Croson*, 488 U.S. at 486-493, 499-505 (opinion of the Court).

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No. 93-1841

IN THE

Supreme Court Of The United States

October Term, 1994

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Petitioner,

v.

FEDERICO PENA, Secretary of Transportation, *et al.*,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Tenth Circuit

BRIEF AMICUS CURIAE OF THE CONGRESSIONAL BLACK CAUCUS IN SUPPORT OF RESPONDENTS

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BRIEF AMICUS CURIAE OF THE CONGRESSIONAL BLACK CAUCUS IN SUPPORT OF RESPONDENTS

INTEREST OF THE AMICUS CURIAE

The Congressional Black Caucus ("CBC") submits this brief as amicus curiae, pursuant to Rule 37 of the Rules of this Court, in support of respondents Federico Pena, Secretary of Transportation, et al., urging affirmance of the decision of the United States Court of Appeals for the Tenth Circuit in *Adarand Constructors, Inc. v. Pena*, 16 F.3d 1537 (10th Cir. 1993). This brief is filed upon the written consent of all parties, copies of which are lodged with the Clerk.

The CBC was formed in 1970 when thirteen African American members of the U.S. House of Representatives joined together to strengthen their efforts to address the legislative concerns of African American and minority citizens. The vision

and goals of the original thirteen members, "to promote the public welfare through legislation designed to meet the needs of millions of neglected citizens," has been reaffirmed through the legislative and political successes of the CBC. The CBC currently has thirty-nine members and is involved in legislative initiatives ranging from full employment, welfare reform, South African apartheid and international human rights, to minority business development and expanded educational opportunity. The CBC and its members have been major proponents and sponsors of the Congressional legislation at issue in this case.

SUMMARY OF THE ARGUMENT

In the decision below, the court of appeals upheld the constitutionality of the subcontracting compensation clause ("SCC") adopted by the Central Federal Lands Highway Division ("CFLHD") acting pursuant to the requirement of the Small Business Act to make subcontracting opportunities available for small business concerns owned by socially and economically disadvantaged individuals. Pub. L. No. 100-656, 102 Stat. 3853 (codified at 15 U.S.C. 644(g) (Supp. 1994)). This decision should be affirmed based upon this Court's prior decisions in *Metro Broadcasting, Inc. v. F.C.C.*, 497 U.S. 547 (1990); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); and *Fullilove v. Klutznick*, 448 U.S. 448 (1980).

Section 502 is a valid exercise of Congress' unique and broad amalgam of powers under the Spending Power, U.S. Const. art. I, § 8, cl. 1; the Commerce Clause, U.S. Const., Art. I, § 8, cl. 3; and the Due Process Clause of the Fifth Amendment, U.S. Const., amend. V. Congress recognized two fundamental principles in adopting Section 502, which is an integral part of the Small Business Act's small business development program. First, at some time after the year 2010, the majority of the population of the United States will be comprised of racial and ethnic minorities and otherwise disadvantaged individuals. If this nation is to prosper economically, these individuals must

soon be brought into the economic mainstream. Second, although this country's guiding principle is, and should remain, that all persons are created equal, this goal cannot be reached solely through the enactment of color-blind legislation or by ignoring the serious racial issues that historically have confronted the United States and that continue to plague it today.

Race has always been, and remains to be, this country's most vexing problem. Severe disparities in wealth along racial lines, resulting from historical discrimination in employment, education, housing, lending, contracting and virtually every aspect of American life, only serve to reinforce and perpetuate negative racial stereotypes and racial polarization. The Petitioner and its supporters attempt to use noble phrases to achieve a result which would be at best ignoble, and at worst destructive not only of this nation's economy, but also of this country's ongoing attempts to reach an era of true equality among the races and inclusion of the disadvantaged. Simply stating that this society is now color-blind will not make it a reality. Congress has long recognized that affirmative action is required to address persistent and pernicious imbalances that have been borne through generations of invidious discrimination.

The Constitution has never been color-blind. Initially, African Americans were considered to be three-fifths of a person, and in the *Dred Scott* case, African Americans were deemed not to be citizens of this country and to have no rights. *Dred Scott v. Sanford*, 60 U.S. (19 Howard) 393 (1857). This case was never overruled but instead was made moot by a Civil War and the passage of the Thirteenth, Fourteenth and Fifteenth Amendments. Unfortunately, in *Plessy v. Ferguson*, 163 U.S. 537 (1896), this Court backed away from fundamental principles and the nation suffered for many years. A similar result should be avoided in this case.

Strict scrutiny is not appropriate in this case. Congress' objectives in adopting Section 502 were clear: to promote the

general welfare and commerce through the inclusion of disadvantaged businesses in this nation's economy, and to remedy the ongoing effects of invidious discrimination. These objectives are within the power of Congress under the Spending Power, the Commerce Clause, and the Fifth Amendment, and the means chosen are within the latitude which Congress is given to achieve its objectives. Moreover, Congress has broad power to determine with whom and how it will deal, as well as the terms and conditions upon which to make purchases.

CFLHD's interpretation and implementation of Section 502 was reasonable and is due deference. The requirements of Section 502, as implemented by CFLHD through its adoption of the SCC, are substantially related to the achievement of Congress' objectives.

The Court should give great weight to Congress' decision. Any other result would serve to not only frustrate legitimate Congressional objectives, but would also represent a denigration of Congress' important role as the National Legislature and a co-equal branch of government.

ARGUMENT

I. BENIGN RACE-CONSCIOUS MEASURES MANDATED BY CONGRESS ARE CONSTITUTIONAL

Congress has the power to adopt benign race-conscious measures for remedial or other purposes, *e.g.* to promote diversity or commerce. "[B]enign race-conscious measures mandated by Congress – even if those measures are not 'remedial' . . . are constitutionally permissible to the extent that they serve important governmental objectives within the power of Congress and are substantially related to the achievement of those objectives." *Metro Broadcasting, 497 U.S. at 564-565; see also, Adarand*, 16 F.3d at 1545. "[R]ace-conscious classifications adopted by Congress to address racial and ethnic discrimination are subject to a different standard than such classifications prescribed by

state and local governments" on account of Congress' role as the National Legislature. *Metro Broadcasting*, 497 U.S. at 565-566. Congress may identify and redress the effects of society-wide discrimination and need not make specific findings of discrimination to engage in race-conscious measures. *Id.* at 565."[I]ts special attribute as a legislative body lies in its broader mission to investigate and consider all facts and opinions that may be relevant to the resolution of an issue. . . . After Congress has legislated repeatedly in an area of national concern, its Members gain experience that may reduce the need for fresh hearings or prolonged debate when Congress again considers action in that area." *Fullilove*, 448 U.S. at 502-503 (Powell, J., concurring).

The Court "cannot, in the name of the Constitution, overturn duly enacted statutes simply 'because they may be . . . out of harmony with a particular school of thought.'" *Harris v. McRae*, 448 U.S. 297, 326 (1980). "Whether wisdom or unwisdom resides in the scheme of benefits . . . is not for [the Court] to say. The answer to such inquiries must come from Congress, not the courts." *Helvering v. Davis*, 301 U.S. *619, 644 (1937).*

The considered decision of Congress must be accorded "great weight" even though the legislation may implicate fundamental constitutional rights. *Fullilove*, 448 U.S. at 472-473. The review of the constitutionality of an Act of Congress is "the gravest and most delicate duty that this Court is called on to perform." *Id.* at 472. It is of overriding significance that an agency's action has been specifically approved -- indeed mandated by Congress. *Metro Broadcasting*, 497 U.S. at 563. "[W]hen a program employing a benign racial classification is adopted by an administrative agency at the explicit direction of Congress . . . ." this Court is bound to approach its "task with appropriate deference to the Congress, a co-equal branch charged by the Constitution with the power to 'provide for the . . . General Welfare of the United States' and 'to enforce, by

appropriate legislation,' the equal protection guarantees of the Fourteenth Amendment." *Id.*; *see also Fullilove*, 448 U.S. at 472.

The determination of what actions promote the general welfare is uniquely a congressional decision. *Helvering*, 301 U.S. at 640. In no matter should the Court "pay more deference to the opinion of Congress than in its choice of instrumentalities to perform a function that is within its power." *Fullilove*, 448 U.S. at 480. Likewise, when Congress explicitly or implicitly delegates to agencies the power to elucidate a specific provision of a statute, the resulting action is entitled to deference. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-844 (1984); see also *Adarand*, 16 F.3d at 1546. "The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." *Morton v. Ruiz*, 415 U.S. 199, 231 (1974); *Chevron*, 467 U.S. at 843.

In achieving its objectives, Congress may employ an "amalgam" of its powers such as the Spending Power, the Commerce Clause, and the Due Process Clause of the Fifth Amendment. *See Fullilove*, 448 U.S. at 473-474. The "use of the moneys of the nation to relieve the unemployed and their dependents is a use for . . . the promotion of the general welfare." *Chas. C. Steward Mach. Co. v. Davis*, 301 U.S. 548, 586-587 (1937). "The reach of the Spending Power, within its sphere, is at least as broad as the regulatory powers of Congress." *Fullilove*, 448 U.S. at 475. Moreover, Congress' power to act under the Commerce Clause is ample and may be used to eradicate discrimination as well as promote commerce. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964). "Congress [is] not restricted by the fact that the particular obstruction to interstate commerce with which it was dealing was also deemed a moral and social wrong." *Id. at 257. Congress' powers under the Commerce Clause and the Fifth Amendment are unique and broad. Adarand*, 16 F.3d at 1544; *see also Bolling v. Sharpe*, 347 U.S. 497 (1954).

Congress' power to further national policy objectives by conditioning the receipt of federal moneys so as to induce voluntary compliance by the recipients (including prime contractors) with federal statutory and administrative directives is an important tool which has been upheld for more than a century. *See Fullilove*, 448 U.S. at 474-476; *Massachusetts v. Mellon*, 262 U.S. 447 (1923); *McGee v. Mathis*, 71 U.S. (4 Wall) 143 (1866). "[T]he United States . . . does have power to fix the terms upon which its money allotments . . . shall be disbursed." *Oklahoma v. United States Civil Service Commission*, 330 U.S. 127, 143 (1947). This Congressional power includes the power to adopt legislation and mandate regulations which promote the procurement of services and supplies from small disadvantaged businesses. In so doing, Congress has the necessary latitude to try new techniques, especially where voluntary cooperation is induced by placing conditions on federal expenditures. *Fullilove*, 448 U.S. at 490.

Congressional power is particularly broad where federal government contracts are involved. As the Supreme Court stated in *Perkins v. Lukens Steel*, 310 U.S. 113, 127 (1940):

> Like private individuals and businesses, the Government enjoys the unrestricted power to produce its own supplies, to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases.

In imposing conditions on expenditures under government contracts, Congress is not exercising "regulatory power over private businesses or employment." *Id.* at 128-129. Rather, Congress is making a legislative determination, pursuant to the Spending Power, that the Government's funds should be used to further the general welfare in a particular manner.

There is a long history of using government contracts to foster anti-discrimination measures. Indeed, the first effort by the Government to affirmatively address the problems of discrimination and disparate treatment of minorities came in an Executive Order issued by President Franklin D. Roosevelt in 1941. Executive Order 8802, 6 Fed. Reg. 3108 (1941). In that Executive Order, which was applicable to government contracts, President Roosevelt established a Fair Employment Practice Commission to govern the employment of minorities by defense contractors.

Over the more than fifty years that have followed, Congress has imposed a series of conditions on expenditures of government contracts to further national objectives. These provisions have been implemented through regulations that are set forth in the Federal Acquisition Regulation (FAR) 41 Parts 19-26 (Socioeconomic Programs). The laws on which these regulations were based were reaffirmed with the passage of the Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, § 4101, Stat. 3243, 3339-40 (1994). In that Act, Congress limited the application of some socioeconomic laws to smaller contracts, *i.e.*, contracts under $100,000, and at the same time Congress retained the full application of socioeconomic provisions to all contracts over $100,000. *Id.*

II. SECTION 502 SERVES THE IMPORTANT GOVERNMENTAL OBJECTIVES OF PROMOTING INTERSTATE COMMERCE AND REMEDYING RACIAL DISCRIMINATION

A. Congress' Adoption of Section 502 was a Considered Decision

Congress' adoption of Section 502 was precisely the type of benign race-conscious decision which is to be accorded great deference and about which Congress should have latitude as to the means by which it chooses to implement its objectives.

The Congress' objectives in adopting Section 502 were clear: to enhance commerce and to remedy the effects of discriminatory practices and similar invidious circumstances by promoting the business development of small disadvantaged businesses in order to bring such concerns into the nation's economic mainstream, and by improving the opportunities for such concerns through the federal procurement process. *See* Joint Explanatory Statement of the Committee of Conference, House Conf. Rep. No. 100-1070, 2d Sess. 73 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5485. Such objectives are within Congress' unique and broad amalgam of powers to provide for the federal welfare, to regulate interstate commerce and to enforce the guarantees of the Fifth Amendment.

Section 502 is an integral part of Congress' ongoing small business development program which is implemented through Section 8(a) (the "Minority Small Business and Capital Ownership Development Program")[1] and Section 8(d) (the "Minority Smali Business Subcontracting Program")[2] of the Small Business Act and is designed to guide federal procurement decisions towards small and small disadvantaged businesses. *See* Senate Rep. No. 100-394, 2d Sess. 1-2 (1988) *reprinted in* 1988 U.S.C.C.A.N. 5402-5403. The program is a bipartisan effort evolving from Executive orders[3] issued by Presidents Johnson

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[1] The 8(a) program authorizes the Small Business Administration to enter into various contracts with other federal departments and agencies and to then "subcontract" the contracts to small disadvantaged businesses. 15 U.S.C. § 637(a).

[2] The 8(d) program obliges prime contractors on major federal contracts to maximize minority participation.

[3] These were not the first Executive Orders dealing with the affirmative action responsibilities of government contractors and subcontractors. Previous Executive Orders dealing with the obligations of government contractors and subcontractors were as follows: President Roosevelt: Exec. Order No. 8802, 3 C.F.R. 957 (1941); Exec. Order No. 9001, 3 C.F.R. 1054 (1941);

and Nixon[4] in response to the finding of the 1967 Report of the Commission on Civil Disorders ("Kerner Commission Report") that disadvantaged individuals did not play an integral role in America's free enterprise system because, *inter alia*, they enjoyed no appreciable ownership of small businesses. Senate Rep. No. 95-1070, 2d Sess. 15, *reprinted in* 1978 U.S.C.C.A.N. 3849. The program was given a statutory basis in 1978 when Congress adopted Public Law 95-507. Act of Oct. 24, 1978, Pub. L. No. 95-507, 92 Stat. 1770. Describing its intent, Congress stated:

> This chapter gives a statutory basis to the 8(a) program. It establishes the policy goal of developing businesses owned by socially and economically disadvantaged persons. It also recognizes the pattern of social and economic discrimination that continues to deprive racial and ethnic minorities, and others, of the opportunity to participate fully in the free enterprise system. The bill is designed to foster business ownership by socially and economically disadvantaged persons and to promote the viability of businesses run

Exec. Order No. 9346, 3 C.F.R. 1280 (1943); President Truman: Exec. Order No. 10,210, 3 C.F.R. 390 (1951); Exec. Order No. 10,227, 3 C.F.R. 739 (1951); Exec. Order No. 10,231, 3 C.F.R. 741 (1951); Exec. Order No. 10,243, 3 C.F.R. 752 (1951); Exec. Order No. 10,281, 3 C.F.R. 781 (1951); Exec. Order No. 10,298, 3 C.F.R. 828 (1951); Exec. Order No. 10,308, 3 C.F.R. 837 (1951); President Eisenhower: Exec. Order No. 10,479, 3 C.F.R. 961 (1953); Exec. Order No. 10,557, 3 C.F.R. 218 (1954); President Kennedy: Exec. Order No. 10,925, 3 C.F.R. 443 (1961), 5. U.S.C. § 631 (1964); Exec. Order No. 11,114, 3 C.F.R. 774 (1963), 5 U.S.C. § 631 (1964); President Johnson: Exec. Order No. 11,246, 3 C.F.R. 339 (1965), 42 U.S.C. § 2000e (Supp. V. 1970); Exec. Order No. 11,375, 3 C.F.R. 320 (1967), 42 U.S.C. § 2000e (Supp. V. 1970).

[4] The most notable of these early efforts was President Richard Nixon's "Philadelphia Plan" which was promulgated under the authority of Executive Order No. 11,246.

> by such persons by providing contract, financial, technical and management assistance.

Senate Rep. No. 95-1070, *supra,* at 3849.

Section 502, adopted as § 221(g) of Public Law 95-507, required federal agencies, in consultation with the Small Business Administration ("SBA"), to establish realistic goals for the participation of disadvantaged businesses in federal contracts. *Pub. L. No. 95-507,* 92 Stat. 1770 (codified at 15 U.S.C. 644(g)(2) (Supp. 1994)), *see also,* House Conference Rep. No. 95-1714, 2d Sess. 27, *reprinted in* 1978 U.S.C.C.A.N. 3887.[5]

In 1988, concerned that "another legislative overhaul was critical," Congress again amended various sections of the Small Business Act and expanded the obligations of federal agencies under Section 502. Business Opportunity Development Reform Act of 1988. Pub. L. No. 100-656, 102 Stat. 3853 ("1988 Reform Act"); *see also* Senate Rep. No. 100-394, *supra,* at 5406.[6] Congress determined that the SBA's minority small business assistance program was a primary catalyst for including small disadvantaged business concerns in the nation's economic mainstream *(Id.* at 5465); that among the problems faced by small disadvantaged business concerns was inadequate support by federal agencies in terms of the number, dollar value and diversity of contracts offered to support these businesses *(Id.* at 5465-5466); and that substantial reforms were imperative if "Congressional mandated business development objectives and purposes" were to be achieved *(Id.* at 5486).

[5] The Section 8(a) program was described only in SBA Standard Operating Procedures prior to the enactment of Public Law 95-507. *See* Senate Rep. No 100-374, *straw* at 1. Congress further amended the SBA's minority business program in 1980 when it adopted Public Law 96-481. Id. at 5404.

[6] The 1988 Reform Act was introduced in the Senate as S. 1993. The House Companion Bill was H.R. 1807.

Section 502 was amended to provide for Presidentially-established annual Government-wide procurement contract goals of not less than twenty percent for small business concerns[7] and five percent for disadvantaged businesses;[8] and to mandate that federal agencies establish annual goals that presented "the maximum practicable opportunity for small and small disadvantaged businesses" which should be not less than the Government-wide goal. 15 U.S.C. §644(g)(1).[9] These goals may be waived. Section 503 was amended to require that the SBA compile and analyze annual reports from procuring agencies with regard to their annual goals. 15 U.S.C. 644(h); *see also* House Conf. Rep. No. 100-1070, *supra,* at 5507. The goals established by Congress were consistent with the existing Department of Defense five percent goal for small disadvantaged businesses and would broaden that goal to government-wide procurement activity. *Id.* at *5507.*

Congress has also adopted other race-conscious mandates through authorization or appropriation measures for: defense *(see* the National Defense Authorization Act for Fiscal Years 1990 and 1991, Pub. L. No. 101-189, 103 Stat. 1352); public works *(see* the Public Works Employment Act of 1977, Pub. L. No. 95-28, 91 Stat. 116, upheld in *Fullilove);* transportation *(see* the Surface Transportation and Uniform Relocation Assistance Act of 1987, Pub. L. No. 100-17 101 Stat. 132); and banking

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[7] The Petitioner does not appear to contest the goal as it applies generally to small business concerns.

[8] Initially, Senate Bill 1993 provided that for fiscal year 1994 and thereafter the goal for small businesses would be twenty percent, and for small disadvantaged businesses ten percent. Sen. Rep. No. 100-394, *supra,* at 5476. The goal for small disadvantaged businesses was reduced before passage of the Act.

[9] The existing Section 502 was redesignated as paragraph 2 and is currently codified as 15 U.S.C. § 644(g)(2) (Supp. 1994).

(see the Financial Institutions Reform, Recovery and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183).

Although the small disadvantaged business program does have a racial component, the program is not primarily based on race, but on size and disadvantage. "These groups may include, not only persons of minority racial or ethnic origin, but also groups such as veterans." Problems Facing Minority and Women Owned Small Businesses, Including SBA Section 8(A) Firms, in Procuring U.S. Government Contracts: An Interim Report, Twenty-Third Report by the Committee on Government Operations (November 29, 1994) p. 2 ("House Interim Report"). The program focuses on business development for all socially and economically disadvantaged individuals, regardless of race or gender. *Adarand,* 16 F.3d at 1541.[10] Congress stated from the outset that

> "[a]lthough it is expected that, as under the present 8(a) program, the majority of qualifying firms will be those owned and operated by racial and ethnic minorities, the program will be open to any business owned by persons who meet the socially and economically disadvantaged test."

House Conf. Rep. No. 100-1070, *supra,* at 3849.

B. Congress had Abundant Evidence to Support the Enactment of Section 502

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[10] "Socially disadvantaged individuals are those who have been subjected to racial or *ethnic prejudice or cultural bias* because of their identity as a member of a group without regard to their individual qualities." 15 U.S.C. § 637(a)(5) [emphasis added]. These individuals must also show that economic disadvantages have diminished their capital and credit opportunities, and have precluded or are likely to preclude such individuals from successfully competing in the open market. 15 U.S.C. § 637(a)(6)(A). Racial minorities may be denied certification, and non-minorities granted certification. *See* 49 C.F.R. Pt. 23, Subpt. D, App. C.

Following a "familiar legislative pattern," Congress had accumulated "abundant evidence" to support the enactment of Section 502. *See Fullilove,* 448 U.S. at 474, 477-478. From 1971 through 1987, various committees of the House of Representatives held fourteen hearings on the topic of the development of small minority or disadvantaged businesses and the role of the Congress and federal agencies. *See* Appendix A, List of Hearings in the House of Representatives. In 1988, the Senate Committee on Small Business conducted the first national study of firms that had graduated from the Minority Business Capital Ownership and Development Program. Senate Rep. No. 100-394, *supra,* at 5405. The same Senate Committee also held five hearings on the 1988 Reform Act, *id.* at 5417-5424, while the House Subcommittee on Procurement, Innovation and Minority Enterprise Development held six hearings, and the full House Committee on Small Business held one hearing on the 1988 Reform Act. *Id.* at 5417-5418.

During these hearings, Senator Kerry testified as to the great disparity between the number of firms designated as 8(a) firms and the number that were granted federal contracts, with the result that in 1986 minority businesses received "a mere 2.4%" of the total federal procurement dollars. Minority Business Development Reform Act of 1987: Hearings on S. 1993 and H.R. 1807 Before the Senate Committee on Small Business, 100th Cong., Sess. 8 (1988). Senator Sasser testified:

> Minorities are still less likely to own a small business. Some 1.8 percent of the minority population owned a business in 1982 compared with 6.4 percent of all business owners. Moreover, minority-owned firms are smaller than nonminority businesses with lower sales and fewer employees. . . . The question of minority business ownership is one that demands continued attention by this committee and by the entire Congress. . . . These hearings and the Chairman's legislative proposal, . . . are an effort to get the 8(a) program to focus on its original statutory objective. That objective is simple enough -- to boost minority ownership of small businesses that can compete in a competitive market.

Hearings on S. 1993 and H.R. 1807, *supra,* at 15-18.

During Congressional debates on the 1988 Reform Act, Congressman Conte stated that the statistical disparity between the number of minority-owned firms capable of doing business with the Federal Government and the percentage of Government procurement dollars they received, demonstrated the need for continued support of small disadvantaged businesses. 134 Cong. Rec. 30057 (1988). Senator Weiker, who described the conferees agreement regarding the five percent Government-wide goal, noted that a "perennial problem for the 8(a) Program has been getting a flow of contracts from all procurement agencies to make the concept [of strengthening small disadvantaged businesses] work." 134 Cong. Rec. 31493 (1988).

In its report, the Senate Committee on Small Business indicated that:

> Title VI [15 U.S.C. 644(g)(1)] of the bill (the 1988 Reform Act) establishes ambitious procurement goals for small business and minority-owned small business. The Committee strongly believes that the procuring agencies must aggressively provide new and meaningful contracting opportunities for small and minority-owned firms. For ease in contract administration, federal agencies are placing greater reliance on larger and consolidated contracts. This trend is making it more difficult for small businesses to successfully bid on contracts. Federal agencies, through the effective use of subcontracting plans and breakout programs, can provide new contract opportunities for small firms. The Committee is convinced that both the

taxpayer and the government will win by an increased degree of small business participation in the federal procurement process. . . .

With respect to businesses owned by socially and economically disadvantaged individuals, the legislation sets a five percent contract award objective. This five percent goal includes both prime and subcontracting opportunities for minority-owned firms. According to the best available data in Fiscal Year 1987, only 3.1 percent of the federal procurement prime subcontracting awards were performed by minority businesses.

Section 1207 of the Department of Defense Authorization bill for Fiscal Year 1988 set a five percent minority business goal for that agency. Despite problems in implementing the program, the Committee believes the five percent goal to be a commendable one that should be attainable government-wide. The Committee recognizes the challenges involved in meeting this ambitious objective. This five percent goal should not be achieved by merely shifting contracts previously set aside for small businesses to minority firms. Instead, federal agencies should increase the slice of the federal procurement pie for minority firms. This goal can be achieved through a variety of techniques. . . .

Id. at 5456-5458.

Further, based on its prior experience, Congress was quite cognizant of the important role that minority and disadvantaged

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[11] In introducing Senate Bill 1993, Senator Bumpers stated that:

minority-owned small businesses make up an important part of our Nation's economic framework. These firms have played an especially important role in revitalizing depressed areas that would otherwise be dependent upon millions of Federal dollars for economic recovery .

Id. at 5414.

businesses play in the economy,[11] and the negative effects upon interstate commerce arising from racial discrimination and other invidious practices.[12] Its specific findings respecting the

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[12] In *Fullilove*, this Court acknowledged that one year before the adoption of Public Law 95-507 "Congress had abundant evidence from which it could conclude that minority businesses have been denied effective participation in public contracting opportunities by procurement practices that perpetuated the effects of prior discrimination." *Fullilove*, 448 U.S. at 477-478.

[13] Specifically, Congress has found:

(A) that the opportunity for full participation in our free enterprise system by socially and economically disadvantaged persons is essential if we are to obtain social and economic equality for such persons and improve the functioning of our national economy;

(B) that many such persons are socially disadvantaged because of their identification as members of certain groups that have suffered the effects of discriminatory practices or similar invidious circumstances over which they have no control;

(C) that such groups include, but are not limited to, Black Americans, Hispanic Americans, Native Americans, Indian Tribes, Asian Pacific Americans, Native Hawaiian Organizations, and other minorities;

(D) that it is in the national interest to expeditiously ameliorate the conditions of socially and economically disadvantaged groups;

(E) that such conditions can be improved by providing the maximum practicable opportunity for the development of small business concerns owned by members of socially and economically disadvantaged groups.

(F) that such development can be materially advanced through the procurement by the United States of articles, equipment, supplies, services, materials, and construction work from such concerns; and

(G) that such procurements also benefit the United States encouraging the expansion of suppliers for such procurements, thereby encouraging

SBA's small business development programs are numerous.[13] These conclusions provide an additional basis for Section 502 (*e.g* discriminatory conditions "can be improved by providing the maximum practical opportunity" for the development of small disadvantaged businesses, 15 U.S.C. §631 (f)(i)(E) (Supp. 1994), and "such development can be materially advanced through the procurement by the United States of articles, equipment, supplies, *services, materials, and construction work from such concerns," 15 U.S.C. §* 631(f)(i)(F) (Supp. 1994) [emphasis added]). Given the exhaustive legislative record, this Court should defer to Congress' judgment.

III. THE SCC AS UTILIZED BY CFLHD IS SUBSTANTIALLY RELATED TO THE ACHIEVEMENT OF CONGRESS' OBJECTIVES

The CFLHD's SCC clause was adopted in 1979 pursuant to Public Law 95-507, which accorded agencies broad discretion to implement the goals of the Small Business Act. *Adarand,* 16 F.3d at 1545. Developed as a means to increase disadvantaged business enterprise participation in Direct Federal contracts, the SCC was found to be a "good approach. . . preferred over noncompetitive methods" because it: (1) was less costly, (2) was a more realistic and rational approach to developing disadvantaged businesses since assistance was provided and assistance gained through established highway construction contractors who were reimbursed for their efforts, and (3) permitted disadvantaged businesses to develop closer and lasting relationships with highway contractors. *See* Appendix B Federal Highway Administration, Evaluation of Subcontracting Compensation Clause, pp. B-4 - B-5 (October 1985).

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competition among such suppliers and promoting economy in such procurements.

15 U.S.C. §631(f)(1) (Supp. 1994).

Compliance is voluntary. The SCC encourages, but does not require, the utilization of disadvantaged businesses through the use of "innovative incentives" which permit general contractors to make rational economic decisions. *Id.* Its impact is limited to subcontractors who, in any event, have no firm expectation that they will be hired. It is not a constitutional defect that a race-conscious program may disappoint an expectation of a non-minority firm, particularly where that expectation is at best speculative. *Fullilove,* 448 U.S. at 484;[14] *Perkins,* 310 U.S. at 127 ("Government enjoys the unrestricted power to determine those with whom it will deal . . . .") The SCC is narrowly tailored and is not over-inclusive because annual certification of disadvantage is required, and such certification is open to all disadvantaged businesses. *Adarand,16* F.3d at 1540, 1547. The SCC is also typical of federal regulations which set "terms and conditions upon which [the Government] will make needed purchases." *Perkins,* 310 U.S. at 127.

In enacting Section 502, Congress explicitly chose agencies such as CFLHD as the "instrumentalities" by which its objectives were to be effectuated. The CFLHD followed Congress' precise directions "to provide a means to ensure '*the maximum practicable opportunity*' for disadvantaged small business participation in federal procurement." *Adarand,* 16 F.3d. at 1545. Congress could have, but has not chosen to limit the SCC program; instead in 1988 Congress amended Section 502 to encourage the further development of similar programs.

The small disadvantaged business program is constantly being reviewed by Congress and has been consistently amended to adjust to current circumstances, *e.g.*, the 1988 Reform Act, a

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[14] Likewise, in the context of interstate commerce the fact that "an otherwise valid regulation causes some business to shift from one interstate supplier to another" is not determinative. *Exxon Corp. v. Governor of Maryland,* 437 U.S. 117, 127 (1978).

"critical overhaul" needed. *Cf. Metro Broadcasting*, 497 U.S. at 594. Since 1988, Congress has conducted periodic hearings on the 8(a) and 8(d) programs. As an example, on November 29, 1994, the House Committee on Government Operations issued an interim report on "Problems Facing Minority and Women-Owned Small Businesses, Including Section 8(A) Firms, In Procuring U.S. Government Contracts." House Interim Report, *supra*. The Committee concluded:

> Minorities confront a number of problems in creating successful small businesses. According to testimony from the subcommittee's July 12 hearing, minorities have had fewer opportunities to develop business skills and attitudes, to obtain necessary resources, and to gain experience, which is necessary for the success of small businesses in a competitive environment. This lack of opportunity occurs primarily because of discriminatory or economic conditions. Hence, it is no surprise that minority business ownership rates lag significantly behind those of nonminorities, and many predominantly minority communities are desperately short of employment opportunities created by small businesses.
>
> Improving access to government contracts and procurement offers a significant opportunity for business development in many industry sectors. . . .

Id. at 5 [footnote omitted]. With regard to discrimination in the construction industry the Committee found:

> [T]here is underlying discrimination against new entrants into the construction field. This is because bonding firms owned by several generations of the same families seem to predominate; and such firms tend to give performance and payment bonds to people they already know and not to the new business person, especially if the small business owner is a woman or of a racial or ethnic minority.

Id. at 14. The Committee also cited with approval the 1992 Final Report of the U.S. Commission on Minority Business Development to the effect that:

> Minority business development efforts are not social programs; they are investments in America's economic system and in its future. Even if we place considerations of equity and historic discrimination aside, it makes absolutely no economic sense to squander more than 2 percent of the nation's most precious resource-human talent-and foster, in effect, practices that primarily focus minorities to be consumers rather than producers of wealth.

Id. at 5.

> Moreover, since this Court's decision in *Croson* there have been no fewer than four Congressional hearings addressing ongoing marketplace discrimination and the need for Congress to remedy such discrimination. Testimony was presented at these hearings by minority business owners from diverse regions of the country in various categories of business including construction, goods, and services. Witness testimony uniformly reflected ongoing marketplace discrimination and heightened barriers and denial of market access.[15]

---

[15] Those hearings were as follows: March 14, 1990 U.S. House of Representatives, Committee on Operations, Hearings on *Richmond v. Croson*; May 16, 1990, Hearings on S. 1235, Before U.S. Senate Committee on Governmental Affairs; and August 1, 1990, Hearings to Assess Impact of *City of Richmond v. J.A. Croson* on Minority Small Business Participation Before U.S. Senate Small Business Committee's Subcommittee on Urban and Minority-Owned Business Development.

Under the circumstances, CFLHD's decision was reasonable and entitled to great deference. *See Chevron*, 467 U.S. at 843-844.

CONCLUSION

For the reasons stated herein, the decision of the court of appeals should be affirmed. Section 502 of the Small Business Act serves the important governmental objectives of promoting commerce and remedying discrimination, which are clearly within the power of Congress. Both Section 502 and the SCC, as implemented by the CFLHD at Congress' direction, are substantially related to the achievement of these objectives.

A contrary result would improperly limit Congress' role as a co-equal branch and create a potential constitutional crisis. Congress' actions here have their primary source in the Fifth Amendment, Spending Clause and the Commerce Clause. Any derogation of Congress' authority would have a serious impact on its ability to act in not only the human rights field, but also in its regulation of commerce, and promotion of the general welfare.

This is a classic instance involving those broad, complex and sensitive issues of national policy which are best resolved by Congress. Congress must have its "choice of instrumentalities to perform a function within its power." *Fullilove*, 448 U.S. at 480. If the decision of the court of appeals is not affirmed, Congress' power to delegate to administrative agencies would be impaired such that Congress would retain little latitude to establish broad policy objectives, and to rely upon administrative agencies for the formulation of policy and the making of rules to fill any remaining gap. Congress cannot effectively legislate on a case by case basis. As the National Legislature, it must be able to address issues on a society-wide basis with the support of the flexibility, narrow-tailoring, and expertise afforded by agency involvement.

The relationship among the branches of government is, like this Court's analysis, a "grave" and "delicate" matter which is due great deference. In the past this Court has recognized that Congress' authority to promote commerce and remedy discrimination through the states is not subject to strict scrutiny. It follows that Congress' authority to do likewise through federal spending should be subject to no greater scrutiny. This Court should adhere to its prior decisions in *Metro Broadcasting* and *Fullilove*.

Respectfully submitted,

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APPENDIX A

LIST OF HEARINGS OF THE

U.S. HOUSE OF REPRESENTATIVES

APPENDIX A

1) Hearings before the Subcommittee on Minority Small Business Enterprise of the Select Committee on Small business, House of Representatives, Ninety-Second Congress, First Session, Pursuant to H. Res. 5 and 19. Washington, D.C., July 27, designed to promote minority enterprise and effectiveness; also created a permanent select committee to conduct studies and investigation of the problems of minority small business. (U.S. Government Printing Office, Washington: 1972).

2) Hearings before the Subcommittee on Minority Small Business Enterprise of the Select Committee on Small Business, House of Representatives, Ninety-Second Congress, H. Res. 5 and 19, Resolutions creating a permanent select committee to conduct studies and investigations of the problems of small business, Volume 2, Washington, D.C., April 25, 26, and 27, 1972 (U.S. Government Printing Office Washington: 1972); a Report of the Subcommittee on Minority Small Business Enterprise to the Select Committee on Small Business, House of Representatives, Ninety-Second Congress, pursuant to H. Res. 5 and 19 with findings and conclusions in creating a permanent select committee to conduct studies and investigations of the problems of small and minority businesses. (U.S. Government Printing Office, Washington: 1972).

3) Hearings before the Subcommittee on Minority Small Business Enterprise and Franchising of the Permanent Select Committee on Small Business, House of Representatives, Ninety-Third Congress, Washington, D.C., October 3 and 4, 1973. Examined the various minority enterprise programs of federal departments and agencies designed to promote minority enterprise development (U.S. Government Printing Office, Washington).

4) Hearings before the Subcommittee on Minority Small Business Enterprise and Franchising of the Permanent Select Committee on Small Business, House of Representatives, Ninety-Third Congress, Washington, D.C., March 21, 1974. Continuing examination of government minority enterprise programs (U.S. Government Printing Office, Washington: 1974).

5) Hearings before the Subcommittee on SBA Oversight and Minority Enterprise of the Committee on Small Business, House of Representatives, Ninety-Fourth Congress, Washington, D.C., July 8, 9, 10, 1975. Examined minority enterprise and allied problems of small business. U.S. Government Printing Office, Washington: 1975); a Report of the Subcommittee on SBA oversight and Minority Enterprise of the Committee on Small Business, House of Representatives, Ninety-Fourth Congress, September 10, 1975. Examined minority enterprise and allied problems of small business. (Government Printing Office, Washington: 1975).

6) Joint Hearing before the Select Committee on Small Business, United States Senate and the Subcommittee on Minority Enterprise and General Oversight of the Committee on Small Business, House of Representatives, Ninety-Fifth Congress, February 6, 1978. Examined minority contracting. (U.S. Government Printing Office, Washington: 1978): Hearing before the Subcommittee on Minority Enterprise and General Oversight of the Committee on Small Business, House of Representatives, Ninety-Fifth Congress, Washington, D.C., May 15, 1978. Examined business opportunities for minority forms with federally-aided railroads. (U.S. Government Printing Office, Washington: 1978)

7) Hearings before the Task Force on Minority Enterprise of the Subcommittee on General Oversight and Minority

enterprise of the Committee on Small Business, House of Representatives, Ninety-Sixth Congress, Second Session, Washington, D.C., March 31, 1980. Among the issues examined were the under-utilization and discrimination against minorities in the transportation industry. (U.S. Government Printing Office, Washington: 1980); Hearings before the Subcommittee on General Oversight and Minority Enterprise of the Ninety-Sixth Congress, Washington, D.C., June 9 and 16, 1980. Among the issues examined were the need for federal administrative support for minority business development activities, including equity financing of minority business and minority business management education. (U.S. Government Printing Office, Washington: 1980); Hearings before the Task Force on Minority Enterprise of the Subcommittee on General Oversight and Minority Enterprise of the Committee on Small Business, House of Representatives, Ninety-Sixth Congress, Anchorage, Alaska, July 16 and 17, 1980. Examined minority business participation in federal programs in Alaska, with such projects as the Alaskan-Canadian National Gas Transportation Project. (U.S. Government Printing Office, Washington: 1980).

8) Hearings before the Committee on Small Business, House of Representatives, Ninety-Seventh Congress (Phoenix, AZ, September 1, 1981; and Atlanta, GA, January 18, 1982); Hearings before the Committee on Small Business, House of Representatives, Ninety-Seventh Congress, Los Angeles, CA, July 7; Chicago, IL, July 18, 1981. Examined how in the decade of the 80's, racism and other barriers to the free enterprise system have placed a heavier burden on the development and maturity of minority businesses.

9) Hearing before the Subcommittee on SBA and SBIC Authority, Minority Enterprise and General Small Business Problems of the Committee on Small Business, House

of Representatives, Ninety-Seventh Congress, Washington, D.C., June 16, 1982. Examined official governmental conduct that impedes the growth and development of minority and small business. (U.S. Government Printing Office, Washington: 1982); Hearing before the Committee on Small Business, House of Representatives, Ninety-Seventh Congress, Philadelphia, PA, March 15, 1982 Examined the impact of new policy directions on small and minority business; A Report issued by the Committee on Small Business, House of Representatives, Ninety-Seventh Congress; examined minority business development efforts of the Small Business Administration (Report No. 97-959) Dec. 10, 1982), (U.S. Government Printing Office, Washington: 1982); A Report of Ninety-Seventh Congress, (Report No. 97-976). Examined small and minority business ownership in the cable television industry (Dec. 17, 1982) (U.S. Government Printing Office, Washington: 1982).

10) Hearing before the Subcommittee on SBA and SBIC Authority, Minority Enterprise and General Small Business Problems of the Committee on Small Business, House of Representatives, Ninety-Eighth Congress, Washington, D.C., April 5, 1984. Among the issues examined was the availability of subcontracting opportunities with major prime contractors; Hearing before the Subcommittee on SBA and SBIC Authority, Minority Enterprise and General Small Business Problems of the Committee on Small Business, House of Representatives, Ninety-Eighth Congress, Washington, D.C., April 10, 1984. Examined small and minority business subcontracting programs; Hearing before the Subcommittee on SBA and SBIC Authority, Minority Enterprise and General Small Business Problems of the Committee on Small Business, House of Representatives, Ninety-Eighth Congress, Washington, D.C., April 25, 1984. Examined small and minority business

subcontracting programs; Hearing before the Subcommittee on SBA and SBIC Authority, Minority Enterprise and General Small Business Problems, of the Committee on Small Business, House of Representatives, Ninety-Eighth Congress, Washington, D.C., June 21, 1984. Examined barriers to minority business in subcontracting programs; Hearings before the Subcommittee on SBA and SBIC Authority, Minority Enterprise and General Small Business Problems of the Committee on Small Business, House of Representatives, Ninety-Eighth Congress, Washington, D.C., June 28, 1984. Examined barriers to minority business in subcontracting and General Small Business Problems of the Committee on Small Business, House of Representatives, Ninety-Eighth Congress, Washington, D.C., September 19, 1984. Examined problem areas confronting disadvantaged business enterprises that impede their growth and development of new and existing firms in the construction industry. (U.S. Government Printing Office, Washington: 1984); Hearing before the Committee on Small Business, House of Representatives, Ninety-Eighth Congress, Oakland, CA, November 28, 1984. Examined minority participation in the Small Business Administration's development programs. (U.S. Government Printing Office, Washington: 1985).

11) Hearings before the Subcommittee on SBA and SBIC Authority, Minority Enterprise and General Small Business Problems of the Committee on Small Business, House of Representatives, Washington, D.C., April 17 and June 5, 1985. Examined structured impediments to minorities in construction and transportation projects; Hearing before the Subcommittee on SBA and SBIC Authority, Minority Enterprise and General Small Business Problems of the Committee on Small Business, House of Representatives, Ninety-Ninth Congress, Washington, D.C., October 22, 1985. Examined the progress of Congressional initiatives

to eliminate problems and barriers that impede the emergence and growth of disadvantaged business enterprises.

12) Hearings before the Subcommittee on SBA and SBIC Authority, Minority Enterprise and General Small Business Problems of the Committee on Small Business, House of Representatives, Ninety-Ninth Congress, Santa Fe, NM, September 8, 1986 (U.S. Government Printing Office, Washington: 1987). Examined minority enterprise and general small business problems. (U.S. Government Printing Office, Washington).

13) Hearing before the Subcommittee on Procurement, Innovation, and Minority Enterprise Development of the Committee on Small Business, House of Representatives, One Hundredth Congress, Washington, D.C., August 4, and October 7, 1987. Examined methods of strengthening federal support for minority business development; Hearing before the Committee on Small Business, House of Representative, One Hundredth Congress, Washington, D.C., September 29, 1987 (U.S. Government Printing Office, Washington: 1988). Examined methods of strengthening federal support for minority business development.

Source: Testimony of Parren J. Mitchell, Chairman Minority Business Enterprise Legal Defense and Education Fund, Before the U.S. Senate, Subcommittee on Urban and Minority-Owned Business Development of the Senate Small Business Committee, 428-A Russell Senate Building, Washington, D.C., Wednesday, August 1, 1990.

APPENDIX B

List of Congressional Hearings

Federal Highway Administration, Evaluation of

Subcontracting Compensation Clause (October 1985)

OFFICE OF DIRECT FEDERAL PROGRAM

WASHINGTON, D.C.

EVALUATION OF DIRECT FEDERAL'S DBE SUBCONTRACTING COMPENSATION CLAUSE

FISCAL YEARS:

1982

1983

1984

1985

FEDERAL HIGHWAY ADMINISTRATION

OCTOBER 1985

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I. Purpose of Review

As a means to increase Disadvantaged Business Enterprise (DBE) participation in Direct Federal contracts, the continued use of the Subcontracting Compensation Clause (SCC) appears to be a good approach. The SCC is preferred over noncompetitive methods because it: (1) appears to be less costly; (2) is a more realistic and rational approach in developing DBE's since assistance is provided and experience is gained through an established highway construction contractor who does get reimbursed for his training effort; and (3) develops closer and lasting business relationships with highway contractors.

This report will serve to fulfill managements desire to determine and document savings, if any, of using the SCC over 8(a) negotiated procurements for meeting imposed DBE goals. In addition to costs, its overall effectiveness was reviewed, including the encouraging of DBE subcontract participation and the providing of assistance to the DBE.

II. Background

For over 14 years, the Federal Highway Administration's (FHWA) Direct Federal Program has been taking affirmative steps to increase disadvantaged business enterprise (DBE) participation in highway construction.

Beginning in FY 1979, Direct Federal undertook a program which would place more responsibilities on the contractors for DBE participation and, in turn, reimburse prime contractors for their expenses incurred for locating, developing, and training disadvantaged firms. Each division developed experimental specifications to provide compensation

to the prime contractor for accomplishing these tasks. The experimental specifications all included a payment percentage applied to the amount subcontracted to DBE's. After this initial experience, the SCC's were refined and various clauses evolved, they included: (1) threshold percentages of work to DBE subcontractors that must be exceeded to become eligible for compensation; (2) maximum percentages of the contract amount which limited the total payment to the prime contractors; (3) provisions for increasing contract time; and (4) criteria for DBE certification. Initial use of the SCC began in FY 1980.

On February 5, 1981, the Direct Federal Program Administrator (DFPA) transmitted a three part Direct Federal policy to the divisions to provide DBE's and women-owned business enterprises (WBE) maximum opportunity to participate in Direct Federal construction and procurement of commodities and services. The first part of this policy is to seek out and encourage DBE/WBE firms to bid independently as a prime, subcontractor, or supplier for Direct Federal projects. The second area of emphasis is to encourage DBE/WBE subcontracting through use of innovative incentives such as the SCC. The third area for encouraging DBE/WBE participation is through Direct Federal use of the Small Business Administration's (SBA) 8(a) program. With this policy, increased emphasis was placed on Direct Federal's DBE subcontracting.

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BRIEF FOR AMICUS CURIAE NATIONAL ASSOCIATION OF MINORITY BUSINESSES, IN SUPPORT OF RESPONDENT

INTEREST OF AMICUS CURIAE[1]

The National Association of Minority Businesses (NAMB) respectfully moves the Court for leave to file, in support of the Respondents, the annexed brief *amicus curiae* on the merits of the appeal in this case by the Petitioner, Adarand Constructors, Inc. NAMB obtained the consent of the United States, Solicitor General and of Mr. William Perry Pendley of Mountain States Legal Foundation, counsel for Petitioner.

I

NAMB is an incorporated 501(C)(6), voluntary, association located in Arlington, Virginia. NAMB members are minority owned businesses nationwide. NAMB maintains a membership totalling 150 companies, of which most or all are members of one minority community or another. NAMB is the premiere, national-scale minority association in the United States which provides business assistance and information regarding federal government procurement. It maintains members from all fifty states and the Virgin Islands. Its purpose is to further the objectives of minority communities, and to provide education, information, training and networking opportunities for these groups. Particularly, at the heart of NAMB is its service of gathering information and providing assistance, to its members, regarding the various federal socially and economically disadvantaged business federal contracting programs. Many members engage in government contracting, both on the basis of federal and state socially and

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[1]The parties have consented to the submission of this brief. Their letters of consent have been filed with the Clerk of the Court.

economically disadvantaged business contracting programs.

Every member of NAMB, and thus NAMB itself, will be impacted by the outcome of this case, hence, the membership and the organization maintain an actual and substantial interest in this matter. Despite its interest, NAMB did not participate in the proceedings in the court below solely because it was unaware that such proceedings were in progress until it was too late to intervene therein.

II

The questions presented by the appeal in this case are vitally important to NAMB, its members and affiliates. The appeal questions, particularly, Department of Transportation socially and economically disadvantaged business federal contracting regulations. However, this case impacts generally all federal government socially and economically disadvantaged business contracting programs. The appeal seeks a determination, among other things, that the socially and economically disadvantaged business federal contracting program in question has exceeded its objectives and otherwise cannot be justified when subject to the appropriate standard. Moreover, that standard has been placed in question. In the broadest sense, then, the effect of racism in this country is under review. Particularly, how and to what extent racism has harmed minorities is questioned.

The potential ramifications of this appeal are broad, and their effect wide-ranging. Conceivably, the practical effect may be a re-examination of and fundamental change to all socially and economically disadvantaged business federal contracting programs. Perhaps, these programs will be removed and new ones recreated. Perhaps, they will just be removed or modified. In any event, the possibilities are numerous, although one thing is clear; any outcome other than one in favor of the Respondent is certain to negatively affect NAMB members.

NAMB members have a substantial business interest in participation in and access to the system governed by the Department of Transportation socially and economically

disadvantaged business federal contracting that is questioned by this appeal, and in most other federal contracting programs. The association itself operates to further enhance participation in such programs. The impact of an outcome favoring the Petitioner will be a removal of or decrease in the primary source of income for many NAMB members, causing a significant and substantial decrease in membership. Likewise, without the benefit of the continued existence of these programs in their present form, which is a conceivable ramification of a successful appeal herein, the heart of NAMB will be viscerated; its purpose minimized, and its *raison d'etre* permanently and substantially decreased.

III

Finally, the Respondents in this case are not in the same position as is NAMB to speak for the whole of minority members around the Country with regard to the important problems of statutory construction before the Court on this appeal. Similarly, other entities which have successfully sought to file briefs *amicus curiae* in this appeal are not in the same position as NAMB. NAMB is, perhaps, the only national-level entity capable of representing all forms of minorities; particularly, those interested in engaging in socially and economically disadvantaged business federal contracting programs. Groups such as the American Civil Liberties Union (ACLU), for example, although representing the needs of minorities generally, do not provide direct assistance with regard to federal socially and economically disadvantaged business federal contracting programs such as the one questioned by this appeal.

Wherefore, NAMB respectfully moves the Court for leave to file the brief annexed hereto on the merits of the questions raised by the appeal.

INTRODUCTION AND SUMMARY OF ARGUMENT

The National Association of Minority Businesses (NAMB), in support of Respondent, hereby asserts its position with regard to the legal issues presented in this appeal. Particularly, NAMB takes issue with the Petitioner's position on several points. First, NAMB challenges Petitioner's argument that the federal regulations under examination impose an automatic presumption of social disadvantage. Second, it is NAMB's position that maintaining diversity in federal government contracting and promoting use of historically under-utilized business concerns furthers both a substantial and a compelling government interest, and otherwise is narrowly tailored to satisfy that interest. Finally, although the interest in maintaining diversity in federal government contracting and the use of historically under-utilized business concerns satisfies both strict and intermediate levels of constitutional scrutiny, intermediate scrutiny is the appropriate standard of review.

I

In pursuit of this appeal, Petitioner claims that there exists a presumption of social disadvantage under the Small Business Administration and Department of Transportation regulations, and that that presumption is automatically and erroneously made, and has caused Petitioner harm. Petitioner's claim is defective in that no such presumption, based on the language of the cited regulations, 13 C.F.R. 124.105(b) and 48 C.F.R. 52.219-8, can be reasonably found. Those sections read together, in pertinent part, mandate the satisfaction of an express condition before a presumption will be made.

Significantly, before a minority contractor may access the program, such minority member must separately qualify for the program, as both socially and economically disadvantaged, after submitting an extensive set of application materials, including financial materials and certifications to the effect that they have in fact been disadvantaged. 13 C.F.R. 124.105(b)(2).

If the condition is not satisfied after review of the application materials, then no presumption is permitted. The

operative language of 13 C.F.R. 124.105(b) reveals this express condition as follows: **"In the absence of evidence to the contrary**, the following individuals are presumed to be socially disadvantaged." (emphasis added). Clearly, the plain meaning of this express language imposes a condition that if and only if there is no evidence showing the applicant has not been disadvantaged in the application materials or elsewhere, can it then be presumed that that applicant has in fact been disadvantaged and gain access to the program. Stated another way, if evidence in the application materials or elsewhere is presented which contradicts a claim of disadvantage, then the minority contractor will not be granted access to the program. No automatic presumption exists as Petitioner claims.

In short, after submitting application materials to evidence a claim that they have been socially and economically disadvantaged, a minority contractor may only then satisfy the requisite condition, and at that point be considered adequately disadvantaged to participate in the program.

II

Moreover, maintaining diversity in federal government contracting furthers both a substantial and compelling government interest, and as such satisfies the requisite legal standard. In fact, the promotion of racial diversity in the area of broadcasting has already been established as furthering an important governmental interest. *See Metro Broadcasting, Inc. v. F.C.C.*, 497 U.S. 547, 110 S.Ct. 2997, 111 L.Ed.2d 445 (1990). Logic and reason dictate that the Court follow *Metro* and apply that rationale to the area of government contracting.

Likewise, the race-based contracting programs are narrowly tailored to surpass both the intermediate and strict scrutiny tests. They additionally cannot be more narrowly tailored than at present without adversely affecting the highly important governmental interests that they have been designed to further, and in fact do further.

ARGUMENT

I. THE PETITIONER'S CLAIM THAT THERE IS A PRESUMPTION OF SOCIAL DISADVANTAGE IS MISLEADING

A. The Personal Eligibility Statement Required Of 8(a) Applicants Demonstrates That No Presumption Of Social Disadvantage Exists

Petitioners claim that "a member of a listed minority group obtains DBE [disadvantaged business enterprise] status merely by proving that individual's membership in one or more of the "presume[d]" disadvantaged minorities."[2] In support of this contention, Petitioners rely on 13 C.F.R. §124.105(b) which states:

> "In the absence of evidence to the contrary, the following individuals are presumed to be socially disadvantaged: Black Americans; Hispanic Americans; Native Americans (American Indians, Eskimos, Aleuts, or Native Hawaiians)..."

Petitioners further rely on 48 C.F.R. §52.219-8, which states in relevant part:

> "The Contractor shall presume that socially and economically disadvantaged individuals include Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, Subcontinent Asian Americans, and other minorities, or any other individual found to be disadvantaged by the Administration pursuant to section 8(a) of the Small Business Act."

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[2]Petitioner's brief at p. 23.

Petitioner's contention that this presumption allows members of the enumerated minority groups to obtain DBE status merely by virtue of showing membership in such groups is not correct. In order to obtain DBE status, one must do much more than simply claim membership in an enumerated minority group, and there is no presumption of DBE status based merely upon membership in one of the enumerated minority groups.

Petitioner misconstrues the process required to obtain DBE status. The regulations relied upon by the Petitioner do not fully illuminate the "social disadvantage" issue. A prospective applicant must certify under penalty of law that he or she is socially disadvantaged. It is the meaning of the certification that is important.

To certify that one is socially disadvantaged, one is alleging under penalty of law that they have been subjected to racial or ethnic prejudice or cultural bias because of their identification [by others] as members of groups without respect to their individual qualities.[3] Simply to be a member of a particular racial or ethnic group does not make one eligible for "social disadvantage" status. The "presumption" discussed in 13 C.F.R. 124.105(b) and relied upon by Petitioner is one of post-certification eligibility for socially disadvantaged status, not final DBE eligibility or status as socially disadvantaged.

To allege that one is socially disadvantaged is to swear and aver to the fact that one has personally experienced racial or ethnic prejudice and/or cultural bias. The regulation relied upon by Petitioner merely illustrates the respect given to an applicant's certification that he or she is socially disadvantaged. It is not a determination of DBE status or "social disadvantage" status.

Petitioner's reliance on 48 C.F.R. 52.219-8 is misplaced in that this regulation does not discuss eligibility for social disadvantage status. Rather, it speaks to the respect that must be

[3]13 C.F.R. 124.105(a).

given by private contractors to the federal certification and eligibility process. In stating that the contractor shall presume that certain groups of individuals are socially disadvantaged, including those certified by the administration and the Small Business Administration's 8(a) program, the regulation merely denies the private contractor the ability to unilaterally bar socially and economically disadvantaged individuals from participation in the programs established for their benefit. Additionally, it directs private contractors to respect the policing process already established under the regulations promulgated by the Department of Transportation and the Small Business Administration.[4] The subject regulation makes clear that private contractors have no authority to upset the procedural process set forth in the regulations and that they must respect the certification process.

13 C.F.R. 124.105(b) begins with the phrase "In the absence of evidence to the contrary..." Such language is at odds with the notion that a presumption of DBE status exists by virtue of membership in an enumerated minority group without more and Petitioner's assertions as such are false. The language of this statute clearly requires more than mere membership in the minority group. The statute does not read "The following individuals are presumed to be socially disadvantaged..." Because the statute requires more, it cannot be said that a presumption of DBE status exists by virtue of membership in one of the enumerated minority groups. The statute requires respect for an individual's certification of social disadvantage. The statutory language cited by the Petitioner is taken out of context and cannot be read without including other sections which effectively set forth the DBE certification process. The certification process not only includes a finding of social disadvantage, but, additionally, economic disadvantage must naturally flow therefrom. Moreover, other elements such as business size, revenue, and duration of time in

[4]49 C.F.R. 23.69 and 13 C.F.R. 124.101, et. seq.

business are determining factors.[5]

In order to obtain eligibility under § 8(a) of the Small Business Act, an individual or concern applicant must complete an 8(a) Personal Eligibility Statement. The first part of this application requests information related to social disadvantage. Question 2 in this section asks an applicant why they are claiming social disadvantage. This question allows an applicant to state that they are claiming social disadvantage because of their identification [by others] as a member of one of the minority groups enumerated in 13 C.F.R. 124.105(b). This does not depend simply upon membership in a minority group, but hinges on the fact that others have identified the applicant as a member of a minority group and have discriminated against the applicant because of this fact. 13 C.F.R. 124.105(a) states:

> "Socially disadvantaged individuals are those who have been subjected to racial or ethnic prejudice or cultural bias because of their identities as members of groups without regard to their individual qualities. The social disadvantage must stem from circumstances beyond their control."

When an applicant claims social disadvantage under question two of the Personal Eligibility Statement, they are certifying that they have experienced racial or cultural bias as an individual. Being a member of a racial minority group alone will not suffice to obtain eligibility. A person who has not experienced specific instances of racial, ethnic or cultural discrimination or bias would not qualify as socially disadvantaged regardless of their race or ethnicity.

The Personal Eligibility Statement asks applicants to further enumerate the types of prejudice they have suffered and to certify that such prejudice has impaired the applicant's ability to

[5]See generally 13 C.F.R. §§124.101 - 124.109.

compete in the free enterprise system due to the applicant's diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged. This detailed inquiry and certification process determines an individual's ability to participate in the program, and to be certified socially and economically disadvantaged. It is not enough that an individual merely be a member of a minority group. One must certify that they have experienced personal discrimination and bias and that as a result of that discrimination and bias, they have been denied access to credit and capital. This is hardly a presumption.

If an applicant responds affirmatively that he or she has been denied access to credit and capital because of discriminatory practices, the applicant is required to document such impairment with specific examples. Moreover, each applicant must sign and certify, under penalty of ten years imprisonment or fine of up to $500,000, that all information in the application is true and complete.[6] Socially disadvantaged status, in other words, must be certified and proved. This extensive, in depth, application process evidences that there is no presumption of DBE status merely because an individual is a member of an enumerated minority group.

B. The Federal Small Business Administration Regulations Require Proof Of Eligibility

The extensive 8(a) application procedure is consistent with the eligibility requirements for participation in the federal

[6]The signature page on the 8(a) Personal Eligibility Statement at paragraph (f) reads as follows: "False Statements: If you make a statement herein which you know to be false, under provisions of the Small Business Act you can be subject to a fine of not more than $500,000 or by imprisonment for not more than 10 years, or both."

contracting programs.[7] Under 13 C.F.R. 124.102, an applicant must first qualify as a small business concern. 13 C.F.R. 124.103 sets forth the requirement that an applicant concern must be at least 51% owned by socially and economically disadvantaged individuals. Management and daily operations must be controlled by applicants determined to be socially and economically disadvantaged under 13 C.F.R. 124.104. 13 C.F.R. 124.105-106 set forth the requirements that an applicant be socially and economically disadvantaged. An applicant must have been in business for two full years in order to be eligible under 13 C.F.R. 124.107, and applicants must adhere to certain standards of conduct to gain eligibility under 13 C.F.R. 124.108. Finally, certain types of businesses are *per se* excluded as ineligible under 13 C.F.R. 124.109.

An individual or concern may show social disadvantage by certifying that others have identified that individual as a member of one of the enumerated minority groups and have discriminated against him accordingly. An individual must certify that he or she has been subjected to racial or ethnic prejudice or cultural bias, as well as certifying that the disadvantage stems from circumstances beyond his or her control.[8] If an applicant elects to show socially disadvantaged status through identification by others and corresponding discrimination as a member of one of these groups, that individual may have further requirements placed upon him. 13 C.F.R. 124.105(b)(2) states:

> "An individual seeking socially disadvantaged status as a member of a designated group may be required to demonstrate that he/she holds himself/herself out and is identified as a member of a designated group if Small Business Administration has reason to question such individual's status as a group member."

This language indicates that merely because an applicant says he or she is a member of a minority group so enumerated does not create a presumption that the applicant is socially disadvantaged. An applicant may be required to prove these allegations. If one is required to prove their status, there can be no presumption of status. Furthermore, if one is required to certify under penalty of up to ten years imprisonment and/or up to $500,000 in fines, that certification of disadvantaged status is accurate, there can be no presumption of socially disadvantaged status. A presumption means there is nothing further to prove.

To qualify as a DBE, an applicant must show more than mere social disadvantage. Economic disadvantage is also required. 13 C.F.R. 124.106 sets forth the criteria for economic disadvantage.

> "For purposes of the 8(a) program, economically disadvantaged individuals are socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same or similar line of business who are not socially disadvantaged, and such diminished opportunities have precluded or are likely to preclude such individuals from successfully competing in the open market. In determining economic disadvantage for purposes of 8(a) program eligibility, Small Business Administration shall compare the applicant concern's business and financial profile with profiles of businesses in the same or similar line of business which are not owned and controlled by socially and economically

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[7] See 13 C.F.R. 124.101 - 124.109 setting forth all of the eligibility criteria that each applicant must meet.

[8] 13 C.F.R. 124.105 (a) states: "Socially disadvantaged individuals are those who have been subjected to racial or ethnic prejudice or cultural bias because of their identities as members of groups without regard to their individual qualities. The racial disadvantage must stem from circumstances beyond their control."

disadvantaged individuals."

Simply because an applicant is determined to be socially disadvantaged does not mean the applicant is also economically disadvantaged. And, if no economic disadvantage can be demonstrated, then the individual will not obtain DBE status. From the language quoted above, it is clear that more than social disadvantage is required to obtain DBE status.

In addition to social disadvantage, an applicant's ability to compete in the free enterprise system must be impaired by diminished capital and credit opportunities as a result of their social disadvantage. The program therefore excludes those members of enumerated minority groups who are socially disadvantaged but who have accumulated substantial wealth.[9] Other factors are also considered in determining economic disadvantage.[10]

In sum, there is no presumption of social disadvantage where an applicant is required to certify and/or prove such disadvantage. To certify that one is socially disadvantaged is to swear and aver to the fact that one has experienced racial, ethnic, and/or cultural bias and discrimination. The eligibility requirements of the 8(a) program and the application itself clearly demonstrate that applicants cannot rely on their membership in an enumerated minority group alone to obtain eligibility, or even to merely obtain socially disadvantaged status, neither of which alone results in DBE certification.

C. Both Small Business Administration And Department of Transportation Regulations Demonstrate That Specific Proof Of Social Disadvantage Is Required

[9]13 C.F.R. 124.106(a)(i)(ii).

[10]13 C.F.R. 124.106(a)(2).

The Petitioner argues that only the specified racial and ethnic classes of persons can be socially disadvantaged. Petitioner argues further that only the specified racial minorities are subject to a presumption of disadvantaged status. These arguments are misleading. First, there is no presumption of socially disadvantaged status. Social disadvantage must be proven, and must be proven on an individual case by case basis. Furthermore, Petitioner's assertion flies in the face of the plain language of the regulations they attempt to construe with respect to the subject procurement eligibility. DBE status in the subject procurement program is governed by either one of two groups of federal regulations. The first group of regulations that determines eligibility for DBE status is the Small Business Act's 8(a) program eligibility requirements.[11] The second set of federal regulations are the regulations promulgated by the Secretary of the Department of Transportation.[12] An individual or concern applicant may obtain socially disadvantaged status under either set of federal regulations for purposes of participation in the subject procurement.

As explained previously, under the 8(a) eligibility requirements, social disadvantage is not limited to members of the enumerated racial or ethnic groups. Eligibility for the program is not foreclosed to anyone, provided they meet the enumerated criteria.[13] Not only is the program open to members of all racial or ethnic groups, but moreover, there is an appeal procedure for added review should an applicant be denied eligibility to participate

[11]13 C.F.R. 124.101-109.

[12]49 C.F.R. 23.51-69.

[13]13 C.F.R. 124.105(a) states the general eligibility as follows: "Socially disadvantaged individuals are those who have been subjected to racial or ethnic prejudice or cultural bias because of their identification as members of groups without regard to their individual qualities."

in the program.[14] Nothing in the regulations stops Petitioner from applying for 8(a) program eligibility and proving their status for participation, even if Petitioner is not a member of one of the enumerated minority groups.

Petitioner mischaracterizes, misstates and misleads the Court with respect to their assertion that the "enumerated" racial minorities alone are eligible for socially disadvantaged status for the purposes of the subject procurement program. The regulations promulgated by the Office of the Secretary of Transportation make it clear that anyone who can demonstrate that they have personally suffered social disadvantage, stemming from his color, national origin, gender, physical handicap or other cause beyond that individual's control, may be eligible.[15] Although racial minorities have been certified, the process is not closed to anyone who can meet the eligibility criteria.

No presumption of socially disadvantaged status can exist where a business must certify its eligibility. According to Department of Transportation regulations 49 C.F.R. 23.51, a Department of Transportation recipient [state authority] must certify as eligible, individuals or concerns who wish to participate in the Department of Transportation programs. 49 C.F.R. 23.53 goes on to set forth the eligibility requirements a recipient must use to determine whether a business is eligible to be certified as an DBE. The regulations do not require the recipient to accept an applicant's claim of eligibility to be certified as an DBE.[16] Recipients are not limited to certifying the enumerated minority

[14]13 C.F.R. 124.101(a) states in relevant part: "If the application is declined on reconsideration based solely on a negative finding of social disadvantage, economic disadvantage, ownership or control, such decline may be appealed by an unsuccessful applicant to the Office of Hearings and Appeals."

[15]49 C.F.R. Part 23, Subpart D, Appendix C, (A)(1)(i) and (ii).

[16]49 C.F.R. 23.53(a)(1).

groups as socially and economically disadvantaged for purposes of program participation, but may determine that individuals not in an enumerated group are also socially and economically disadvantaged. For Department of Transportation program purposes, there is no presumption of eligibility. Rather, the presumption created is that the DBE status certified by the applicant under 49 C.F.R. 23.51 is accurate. Even that presumption may be rebutted by the recipient [state]. 49 C.F.R. §23.53(a)(1) merely allocates the burden of proof to the recipient [state] after an applicant has certified to socially disadvantaged status. The challenge procedures clearly state that individual instances of bias and discrimination must be shown in order to obtain DBE status, and more particularly, socially disadvantaged status. An "individual must demonstrate that he or she has personally suffered social disadvantage, not merely claim membership in a non-designated group which could be considered socially disadvantaged."[17] This can be achieved by setting forth with particularity the instances of discrimination to which the applicant has been subjected. These procedures establish that there is no presumption of eligibility and that such status must be certified, and that certification may be challenged. The Department of Transportation DBE certification process differs from that of the Small Business Administration's 8(a) program in that once certification by the prospective participant [DBE] to the recipient occurs, under Department of Transportation regulation, it is not final. It may be challenged and overturned by the recipient of the subject highway funds, and must be proved again to the recipient in accordance with the challenge procedures set forth in 49 C.F.R. 23.69. 49 C.F.R. Part 23, Subpart D, Appendix C states, in relevant part:

"In making determinations of social and economic

[17]49 C.F.R. Part 23, Subpart D, Appendix C, (A)(1)(ii).

disadvantage, recipients should be guided by the following standards, which have been adopted from materials prepared by the [Small Business Administration]...The individual must demonstrate that he or she has personally suffered social disadvantage, not merely claim membership in a non-designated group which could be considered socially disadvantaged. This can be achieved, for example, by describing specific instances of discrimination which the individual has experienced, or by recounting in some detail how his or her development in the business world has been thwarted by one or more of the listed causes or similar causes. As a general rule, the more specific an explanation of how one has personally suffered social disadvantage, the more persuasive it will be...The individual's - social disadvantage must be rooted in treatment which he or she has experienced in American society...The individual's social disadvantage must be chronic, longstanding, and substantial, not fleeting or insignificant...Usually, only by demonstrating a series of obstacles which have impeded one's progress in the business world can an individual demonstrate chronic, longstanding, and substantial social disadvantage...The recipient should consider, as evidence of an individual's social disadvantage, unequal access to credit or capital..."

These regulations are clear in that there is no presumption of eligibility for socially disadvantaged status simply because an applicant is an "enumerated" racial minority.

A recipient [state] may not challenge 8(a) certification; that program is regulated solely by the Small Business Administration. The Federal Department of Transportation regulations direct the state to recognize a DBE's certification of social disadvantage under 49 C.F.R. 23.62. Once the prospective DBE certifies that the applicant is socially disadvantaged under the Department of Transportation regulations, that certification, not merely the

membership of an applicant in one of the enumerated minority groups, is the act which creates a rebuttable presumption that the certification is proper. This rebuttable presumption is discussed at 49 C.F.R. 23.53 and 23.62. A presumption of social disadvantage is distinguishable from a rebuttable presumption that a DBE's Department of Transportation certification of social disadvantage is proper. The respect given to Department of Transportation certification is what creates the presumption. Moreover, unlike the Small Business Administration certification, Department of Transportation allows policing of its program certification by the state. Small Business Administration has its own internal appeals and enforcement procedures.

There is no presumption of social disadvantage simply by an individual's membership in a racial or ethnic minority group. Socially disadvantaged status must be proved and certified individually on a case by case basis by those individuals who seek this status. Insufficient evidence of this status will result in an individual not being deemed socially disadvantaged under either group of federal regulations. The only presumption created in either of these groups of federal regulations is one of accuracy once an individual seeking socially disadvantaged status under either group of regulations so certifies. Meaning, once an individual certifies socially disadvantaged status to Department of Transportation and that certification is acknowledged with respect to program eligibility, the presumption arises that the information relied upon in acknowledging such certification is accurate. The recipient is able to use this presumption in determining whether it, too, will grant certification. There can be no presumption of social disadvantage when an individual must certify and prove those facts which would create eligibility. A presumption does not require proof.

II. THE SUBJECT FEDERAL CONTRACTING PROGRAMS ARE CONSTITUTIONAL AND PASS BOTH INTERMEDIATE AND STRICT SCRUTINY ANALYSIS

A. Diversity In Federal Contracting And Business Utilization Is Both A Substantial And Compelling Governmental Interest

In *Wygant v. Jackson Board of Education*, 476 U.S. 267, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986), this Court determined that a state agency seeking to impose a race-based layoff provision must justify that action by showing such action is necessary to a compelling state interest. More specifically, the Court stated that to satisfy this heightened level of scrutiny, the proponent of the race-based provision must meet a two-pronged test. First, it must be shown that the provision is justified by a compelling governmental interest.[18] The second prong of the test requires that the challenged provisions have been narrowly tailored to achieve the compelling government interest.[19]

The Federal Construction Procurement Program was created for the purpose of including historically under-utilized businesses in government contracts.[20] Such a governmental

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[18]*Wygant v. Jackson Board of Education*, 476 U.S. 267, 274, citing *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984).

[19]*Fullilove v. Klutznick*, 448 U.S. 448, 480, 100 S.Ct. 2758, 65 L.Ed.2d 902 (1980).

[20]15 U.S.C. 631 (e)(2) states: "It is, therefore, the purpose of section 8(a) [15 U.S.C. §637(a)] to -

> (A) promote the business development of small business concerns owned and controlled by socially and economically disadvantaged individuals so that such concerns can compete on an equal basis in the American economy;
> (B) promote the competitive viability of such concerns in the

concern is compelling. It is at least as compelling as the purpose of promoting racial diversity. In *University of California Regents v. Bakke*, 438 U.S. 265, 311-315, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978), this Court found racial diversity in higher education to be a compelling government interest. Simply because this Court has not articulated that the inclusion of historically under-represented businesses in government contracting is a compelling government interest does not foreclose that possibility.[21] Moreover, Petitioner, in its brief, has conceded that this Court in the past has found a compelling governmental interest exists where the purpose of a challenged act is to remedy past discrimination. At the very least, the articulated purposes of the Federal Construction Procurement Program are intended to do just that.

In establishing a compelling governmental interest it is unnecessary to identify the specific instances of discrimination to be remedied. In Justice O'Connor's concurring opinion in *Wygant*, at 286, she states that "this remedial purpose need not be accompanied by contemporaneous findings of actual discrimination to be accepted as legitimate as long as the public actor has a firm basis for believing remedial action is required."

Congress made specific findings concerning the use of socially and economically disadvantaged businesses and the need to increase the utilization of such concerns in federal construction projects.[22]. The findings by Congress demonstrate the need to encourage diversity among competitors for government contracts,

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> marketplace by providing such available contract, financial, technical, and management assistance as may be necessary; and
> (C) clarify and expand the program for the procurement by the United States of articles, supplies, services, materials, and construction work from small business concerns owned by socially and economically disadvantaged individuals.

[21]*Wygant, supra*, at 286 (O'Connor, J., concurring).

[22]15 U.S.C. §631(e)(1).

as well as diversity among competing concerns in the national economy. These findings demonstrate the basis for the firm belief of Congress that remedial action was required. Every participant in the program, whether certified by the Department of Transportation or Small Business Administration has certified and proven they have individually experienced acts of discrimination and/or bias, and that these acts have affected their ability to act in the business world. This is more than mere past discrimination, it is evidence of present and ongoing discrimination and bias.

In order to withstand constitutional scrutiny under an intermediate standard, it must be shown that the challenged act is important to a substantial governmental interest.[23] In light of the atmosphere of ongoing discrimination and bias, the interest of diversity in federal contracting is more than important, it is compelling. This Court addressed the issue of local action adopting minority set-aside programs in *City of Richmond v. Croson*, 488 U.S. 469, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989). There this Court held that the appropriate level of scrutiny to be applied was strict scrutiny, requiring the local action to be necessary to a compelling governmental interest. However, in *Fullilove*, the Court declined to apply the strict scrutiny standard to a federal public works act. Finally, in *Metro Broadcasting*, the Court confirmed its holdings in the prior decisions and opined that *Croson* is not the appropriate standard of review for Congressional acts. Today, *Metro Broadcasting* controls the level of scrutiny to be applied to the federal program being challenged.

The Petitioner seems to infer that if Congress deals with a suspect class that Congress cannot have a level of review lower than strict scrutiny. It is well settled that Congress has a lower standard of review for its dealings with suspect classes than do the States. In *Nyquist v. Mauclet*, 432 U.S. 1, 53 L.Ed.2d 63 (1977),

[23]*Metro Broadcasting, Inc. v. F.C.C.*, 497 U.S. 547, 110 S.Ct. 2997, 111 L.Ed. 2d 445 (1990), *Fullilove v. Klutznick*, 448 U.S. 448, 100 S.Ct. 2758, 65 L.Ed.2d 902 (1980).

this Court ruled that in dealing with alienage, a suspect class, the program initiated by the state of New York was to be reviewed using strict scrutiny. The Court went further to say that the standard of review used to judge congressionally promulgated laws dealing with alienage was a different standard of review. The *Nyquist* Court noted that in *Matthews v. Diaz*, 426 U.S. 67, 96 S.Ct. 1883, 48 L.Ed.2d 478 (1976), decided the previous year, the Court applied a relaxed scrutiny and upheld a federal statute which based eligibility for federal medical insurance of aliens upon a durational residency requirement. The Court stated in relevant part, "...Congress, as an aspect of its broad power over immigration and naturalization, enjoys rights to distinguish among aliens that are not shared by the States."[24] It is not an aberration that acts of Congress are treated differently than acts of the States. Thus, the difference between *Fullilove v. Klutznick*, *Metro Broadcasting v. F.C.C.*, and *City of Richmond v. Croson* are well rooted in precedent established by this Court. In the case at bar, Congress enjoys broad powers over spending and commerce, and should be afforded the same relaxed scrutiny as in *Matthews v. Diaz*.

In *Metro Broadcasting*, this Court found that racial diversity is an important governmental objective. Like the minority businesses in *Metro Broadcasting*, the minority business in the instant case is in competition with non-minority businesses which have historically dominated the industry. The articulated purposes of the Federal Construction Procurement Program of encouraging full participation by minorities in our free enterprise system to reach a level of economic equality and encouraging the development of small business concerns are consistent with the government interest of racial diversity articulated in *Metro Broadcasting*. Racial diversity in broadcasting and higher

[24]*Matthews v. Diaz*, 426 U.S. 67, 84-87.

education are no less important than racial diversity in industry.[25] If this type of governmental interest is important enough to withstand constitutional muster in the broadcast arena, it is surely sufficient in this instance as well. Racial diversity is no less important here. That Congress specifically articulated its purpose in enacting the Federal Construction Procurement Program as goals of full participation and economic equality is synonymous with the purposes of racial diversity. Diversity in federal contracting is both a substantial and a compelling governmental interest and survives both strict and intermediate level constitutional scrutiny.

B. The Subject Federal Contracting Programs Are Narrowly Tailored And Pass Both Intermediate And Strict Constitutional Scrutiny

The second prong of an intermediate level scrutiny analysis requires the government action to be substantially related to the achievement of its important governmental interest. In deciding this factual question, the Court has recognized that agency and Congressional fact-finding warrant great weight.[26] The Congressional findings in this regard, through the certification

[25]The Court in *Metro Broadcasting*, while recognizing racial diversity in broadcasting as an important governmental objective, also relied upon its prior opinion in *University of California Regents v. Bakke*, 438 U.S. 265, at 311-313 that racial diversity in higher education is such a governmental interest upon which race-based admissions criteria may be based.

[26]In *Metro Broadcasting* the Court analyzed the deference that should be given to Congress and the FCC in determining whether minority ownership policies were substantially related to the important governmental interest of broadcast diversity. With respect to such questions, the Court required itself to give "great weight to the decisions of Congress and the experience of the Commission", citing *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, at 102, 93 S.Ct. 2080, at 2086 (1973).

process, make these issues crystal clear.[27] In both the Small Business Administration and Department of Transportation regulations, an applicant must certify and prove that they have been discriminated against; denied business opportunities; and, have received unequal access to credit and capital. The Department of Transportation regulations in pertinent part explain that evidence of social disadvantage includes evidence of unequal access to credit or capital; acquisition of credit under unfavorable circumstances; discrimination in receipt, award, and/or bid of government contracts; discrimination by potential clients; exclusion from business or professional organizations; and other similar factors which have retarded the individual's business development.[28] All of these elements of social disadvantage are important to a substantial government interest, as well as necessary to a compelling government interest, and are related to the enumerated Congressional purpose of achieving full participation, economic equality, as well as racial diversity in federal contracting.

In order for a challenged act to be narrowly tailored under the strict scrutiny standard, the inquiry is whether a less restrictive means could have been used to effectuate the purposes of the challenged act.[29] In tailoring an action so as to effectuate it in the least restrictive way, this Court has recognized that it may sometimes be necessary to have innocent persons bear some of the burden.[30] However, in fashioning a remedial program that affects innocent persons, the means chosen should not be such that they impose a "disproportionate harm on the interests, or unnecessarily trammel the rights of innocent individuals directly and adversely

[27]15 U.S.C. §631 (e)(1) sets forth the findings of Congress with respect to the purposes of the development of the 8(a) program.

[28]49 C.F.R. 23.69, Appendix C, (A)(2)(iii).

[29]*Wygant*, at 280 (footnote 6).

[30]Id. at 280-281.

affected by a plan's racial preference."[31] It is permissible to burden innocent parties in a manner which does not unnecessarily trammel the interests and rights of such parties, the effect of which is to merely foreclose one of many options of these parties.

The Federal Construction Procurement Program, while it does affect innocent parties, does not do so in an impermissible manner. The program gives opportunities to socially and economically disadvantaged, as well as historically under-utilized, businesses. It does not directly take away anything, unduly burden, or traverse upon the rights of innocent parties. In this way the Federal Construction Procurement Program can be analogized to remedial hiring goals. This Court in *Wygant*, at pp. 282-283, has stated, "denial of a future employment opportunity is not as intrusive as loss of an existing job." In the case at bar, Petitioner has not shown that it had any firm expectation of receiving the subcontract. Petitioner was one of many who submitted a bid for the project, uncertain of whether it would be hired. Petitioner's expectation of being hired was no greater than that of any other bidder. Moreover, Petitioner was not deprived of anything. The Federal Construction Procurement Program is narrowly tailored to the compelling governmental interest of promoting utilization of historically under-utilized business concerns and encouraging diversity in the competitive market for government contracts. As the decision to award the subcontract to Respondent was a hiring decision, it may be considered a less intrusive means of achieving the governmental interest at stake. The burden of the Federal Construction Procurement Program is sufficiently distributed among a large population, all subcontract bidders, so as to make its methods less intrusive.

The Federal Construction Procurement Program is narrowly tailored in another respect. The program is open to all socially and economically disadvantaged business concerns that are able to meet

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[31]Id. at 287 (O'Connor, J., concurring).

the program's strict eligibility criteria. 13 C.F.R. Ch. 1 §124.101 (a) states that in order to obtain eligibility to participate in the program, applicants must meet all the eligibility criteria[32]. 13 C.F.R. Ch. 1 §124.101 (b) goes on to state that to maintain eligibility, the same criteria must continue to be met. In short, to be eligible for the Federal Construction Procurement Program, an applicant must qualify as a small business concern, the applicant concern must be at least 51% owned by a U.S. citizen(s) who qualifies as socially and economically disadvantaged, the concern must be managed and controlled by socially and economically disadvantaged individuals, the concern must have been in business in its industry classification for a minimum number of years (2), the concern may be subject to individual character review, and certain types of businesses are per se excluded from the program. 13 C.F.R. Ch. 1 §§124.102-124.109.

Eligibility in the Federal Construction Procurement Program requires much more than simply qualifying as a socially and economically disadvantaged business concern. The socially and economically disadvantaged criteria is further divided. Once a concern acquires socially disadvantaged status, that status merely qualifies the concern under one of many eligibility requirements. A showing of social disadvantage does not alleviate the need to show economic disadvantage, among other requirements. The Federal Construction Procurement Program requirements for eligibility are extensive and clearly show that Congress, in enacting the program, narrowly tailored it to comport with the specific purposes of the act and compelling governmental interests. The Federal Construction Procurement Program is not broad or overreaching, but is narrowly tailored since those concerns which become certified under Federal Construction Procurement must show with particularity their social and economic disadvantage and must swear under oath to that fact.

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[32]see also Office of the Secretary of Transportation regulations at 49 C.F.R. Part 23, Subpart D, Appendix C.

Moreover, the Federal Construction Procurement Program is limited in extent and duration. 13 C.F.R. Ch. 1 §124.101(b) sets forth the requirements for continuing eligibility. Those provisions require concerns to continue meeting the initial eligibility requirements, and further set forth procedures by which to terminate a concern's eligibility to participate in the program. This ensures that once certified, a concern may not take advantage of its participation in the program indefinitely. The act goes so far as to encourage private policing of its provisions by the general public to ensure that individuals or concerns which are not eligible will be so identified. 13 C.F.R. Ch. 1 §124.101(c).

In sum, the Federal Construction Procurement Program is sufficient to withstand constitutional muster under the strict scrutiny standard. The program serves a compelling governmental interest and is narrowly tailored to achieve those interests.

CONCLUSION

The federal contracting program in question is narrowly tailored to achieve a compelling government interest. There is no presumption of social disadvantage. It is not overinclusive, overbroad, or overreaching. It does not go on in perpetuity and its duration is sufficiently limited. The proper standard of review of this program is intermediate or relaxed scrutiny. It need only be demonstrated that the program in question is substantially related to an important government interest. Nevertheless, the subject program also passes a strict scrutiny analysis as well, since it is necessary to a compelling state interest and narrowly tailored to achieve that interest.

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INTEREST OF THE AMICI CURIAE

Amici states implement many federal programs enacted by Congress to remedy racial discrimination, including the highway contracting minority incentives program challenged by petitioner in this case. Since this Court's decision in *Fullilove v. Klutznick*, 448 U.S. 448 (1980), challenges to such Congressionally-enacted remedial programs have generally been reviewed by the lower courts under a standard lower than the strict scrutiny which petitioner demands. A ruling by this Court imposing strict scrutiny on legislation enacted by Congress to remedy racial discrimination would call into question the continuing validity of these programs.

In addition, many states have enacted race-conscious programs to remedy discrimination. Like the incentive program at issue here, state remedial programs are based on legislative findings concerning problems and determinations of the best solutions. Amici believe those legislative findings should be accorded deference, not second-guessed by courts. Thus, the constitutionality of key state programs may be affected by the standards established with respect to the power of Congress to act in this case. *See City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 491-92 (1989).

Amici believe that the decision of the court of appeals is correct, and submit this brief to assist the Court in its resolution of the case.

SUMMARY OF ARGUMENT

This case involves a Congressionally-mandated race-conscious remedy to counter the continuing effects of past racial discrimination in federal procurement contracting.

Thus, it does not present the specific issue decided by this Court's landmark opinion 15 years ago in *Fullilove v. Klutznick*, 448 U.S. 448 (1980): Congressional legislation requiring states to implement a race-conscious remedy for the continuing effects of past discrimination by states is not subject to strict scrutiny. Nor does this case involve the central proposition of this Court's most recent "affirmative action" ruling in *Metro Broadcasting v. FCC*, 110 S.Ct. 2997 (1990): Race-conscious federal legislation may be justified by interests that are not remedial.

This case nonetheless is governed by the fundamental tenet that guided *Fullilove* and *Metro Broadcasting*: Congress, as the national legislature, specifically empowered by the Reconstruction Amendments to enforce those guarantees of racial equality, is to be accorded particular deference by this Court when Congress enacts legislation designed to remove the present results of past racial discrimination. That deference was constitutionally correct in 1980 and 1990 and remains so today.

Even if this Court were now to abandon proper deference to Congress in this area and, for the first time, to require that Congress provide a "compelling state interest" and adopt "narrowly tailored" race-conscious measures, basic separation of powers principles, and the specific powers granted to Congress under the Reconstruction Amendments, bar the Court from requiring of Congress the same type of factfinding necessary to support the imposition of a race-conscious remedy by a lower federal court or a state legislature. Instead, respect for Congress' special role in this area requires greater judicial deference to Congress'

factfinding in determining the need for, and the scope of, a race-conscious remedy.

As discussed below, that result is strongly supported by this Court's seminal decisions reviewing Congress' actions under section 5 of the Fourteenth Amendment. Those decisions recognize Congress' substantive power to identify equal protection violations as well as its broad remedial power to address them. Moreover, where, as here, the challenged legislation provides a race-conscious remedy for past racial discrimination by the federal government, the Thirteenth Amendment provides a specific textual source of Congressional power to identify "badges and incidents of slavery" and to address them with remedial power equivalent to that under section 5 of the Fourteenth Amendment.

Deference to Congress' factfinding in this context also reflects basic constitutional notions of the tripartite structure of the federal government. The institutional characteristics of Congress grant that branch factfinding capabilities that complement or improve on those available to the courts, and that are particularly relevant to determinations of the federal government's racial discrimination and the appropriate remedy.

This Court should not brush aside the holding of *Fullilove* and the long-standing principles on which that case rests regarding the Constitutional allocation of power between Congress and the Court to protect the rights of "discrete and insular minorities." For the reasons set out below, amici urge the Court to affirm the Tenth Circuit's ruling in this case.

ARGUMENT

I. The Reconstruction Amendments Require Judicial Deference to Congress' Determination of the Need for Legislation to Remedy Racial Discrimination by Private Parties or the Federal Government as well as the States.

A. *Fullilove* and *Metro Broadcasting* Reject Strict Scrutiny of Race-Conscious Remedial Legislation Enacted by Congress.

This Court's decision in *Fullilove v. Klutznick*, 448 U.S. 448 (1980), stands for the proposition that strict scrutiny, as defined by petitioner, is too intrusive a standard for judicial review of an act of Congress requiring states to set aside a percentage of federal construction funds for minority businesses as a remedy for past racial discrimination. *Metro Broadcasting v. FCC*, 110 S.Ct. 2997, 3008 (1990) ("A majority of the Court in *Fullilove* did not apply strict scrutiny to the race-based classification at issue."); *id.* at 3032 (O'Connor, J., dissenting) ("the Court correctly observes that a majority did not apply strict scrutiny....").

The principal *Fullilove* opinion, written by Chief Justice Burger and joined by Justices White and Powell, "recognize[s] the need for careful judicial evaluation to assure that any congressional program that employs racial or ethnic criteria to accomplish the objective of remedying the present effects of past discrimination is narrowly tailored to the achievement of that goal." *Fullilove*, 448 U.S. at 480.

Although the Chief Justice noted that the remedial legislation at issue in *Fullilove* would pass even strict scrutiny, *id.* at 492, his test does not limit potential governmental interests to "compelling" ones, nor, in finding that the set-aside was "narrowly tailored," does his opinion impose a "least restrictive alternative" test. *See id.* at 479-90; *compare City of Richmond v. J.A. Croson Co.* 488 U.S. 469, 507-08 (1989) (reviewing city's minority set-aside under a least restrictive alternative standard).

Justice Marshall's opinion, joined by Justices Brennan and Blackmun, imposes a standard of review that is clearly more deferential than that of Chief Justice Burger: "[T]he proper inquiry is whether racial classifications designed to further remedial purposes serve important governmental objectives and are substantially related to achievement of those objectives." *Fullilove*, 448 U.S. at 519 (Marshall, J., concurring in the judgment). Moreover, Justice Marshall went on to conclude that the set-aside in *Fullilove* was not merely "substantially related," but "carefully tailored" to the "important and congressionally articulated goal of remedying the present effects of past discrimination." *Id.* at 521.[1]

Regardless of the precise formulations employed in articulating the standard of judicial review, in upholding the

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[1] Justice Powell also wrote a concurring opinion, stating that "racial classification ... is constitutionally prohibited unless it is a necessary means of advancing a compelling governmental interest," *Fullilove*, 448 U.S. at 496 (Powell, J., concurring). Yet he, like the Chief Justice, made clear that he would not require that Congressional remedial legislation satisfy a "least restrictive means" test. *Id.* at 508. Whether one agrees with petitioner that Justice Powell adopted strict scrutiny or not, it remains true that a majority of the Court did not adopt a strict scrutiny test.

set-aside the separate opinions of a majority of the Court recognized Congress' power to identify racial discrimination and to implement a remedy for it, and the corresponding need for judicial deference to Congress' determinations in this area. The Chief Justice's opinion begins by noting the "deference" due to Congress as a "coequal branch" given express enforcement power under the Fourteenth Amendment. *Fullilove*, 448 U.S. at 472 (Burger, C.J.). Based on the Court's recognition of Congress' broad power under the enforcement clause of the Fourteenth Amendment in *Katzenbach v. Morgan*, 384 U.S. 641 (1966), and *Oregon v. Mitchell*, 400 U.S. 112 (1970), and of Congress' similarly broad power under the enforcement clause of the Fifteenth Amendment in *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), the Chief Justice concluded that Congress may identify, and adopt remedial legislation to counter, the effects of past discrimination even where the Court would not find a violation of the Equal Protection clause. Inherent in such a view of Congress' power is corresponding judicial deference to Congress' determination of a "state interest" sufficient to require a race-conscious remedy. *Fullilove*, 448 U.S. at 476-77 (Burger, C.J.). Similarly, citing Congress' "broad remedial powers," *id.* at 483, the Chief Justice stated that in determining whether the program was "narrowly tailored," "doubts must be resolved in support of the congressional judgment that this limited program is a necessary step.... " *Id.* at 489.

Indeed, the Chief Justice's refusal to adopt either of the standards of judicial review that the Court had just articulated in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), *see Fullilove*, 448 U.S. at 492, and his adoption instead of a standard derived from *Morgan*,

Mitchell, and *South Carolina v. Katzenbach*, shows that he viewed remedial legislation by Congress as demanding a distinct and more deferential standard of judicial review than remedial action by other bodies. He saw the issues posed by the Congressional enactment in *Fullilove* as more like those posed by the Congressional enactments in *Morgan* than those posed by the Regents' minority preference in *Bakke* -- because Congress has greater powers in the equal protection area. *See also* 448 U.S. at 499 (Powell, J., concurring) ("Unlike the Regents ... Congress properly may - and indeed must - address directly the problems of discrimination in our society."); *id.* at 502 (Powell, J., concurring) ("It is beyond question ... that Congress has the authority to identify unlawful discriminatory practices, to prohibit those practices, and to prescribe remedies to eradicate their continuing effects."); *id.* at 520, n.4 (Marshall, J., concurring in the judgment).

Four years ago, in *Metro Broadcasting*, the Court relied on *Fullilove* to uphold the FCC's minority preference in allocating broadcasting licenses in the interest of racial diversity in broadcasting. Echoing Justice Marshall's concurrence in *Fullilove*, the Court in *Metro Broadcasting* extended the deferential *Fullilove* standard to non-remedial as well as remedial legislation. "We hold that benign race-conscious measures mandated by Congress - even if those measures are not remedial in the sense of being designed to compensate victims of past governmental or societal discrimination -- are constitutionally permissible to the extent that they serve important governmental objectives within the power of Congress and are substantially related to achievement of those objectives." *Metro Broadcasting*, 110 S.Ct. at 3008-09.

The express holding of *Metro Broadcasting* squarely answers the second question presented in the instant petition for certiorari by rejecting the strict scrutiny standard proffered by petitioner in this case. Indeed, since the federal program challenged here is remedial, this case is an even stronger instance than *Metro* itself for application of a standard lower than strict scrutiny. *Cf. Metro Broadcasting*, 110 S.Ct. at 3031 (O'Connor, J., dissenting) (*Fullilove*'s lower standard "applies at most only to congressional measures that seek to remedy identified past discrimination.").[2]

Dissenting in *Metro Broadcasting*, Justice O'Connor, joined by Chief Justice Rehnquist and Justices Scalia and Kennedy, argued that judicial deference to Congress' determination of a government interest warranting particular race-conscious relief is strictly confined to instances in which Congress imposes such mandates on the states, and does not extend to the administration of federal programs by federal officials. *Metro Broadcasting*, 110 S.Ct. at 3030-31 (O'Connor, J., dissenting). Looking to the text of the Fourteenth Amendment, the dissent argued that all Congress can do under that Amendment is provide oversight to the

[2] Justice O'Connor's dissent in *Metro Broadcasting* distinguished *Fullilove* on three grounds: first, that it involved a Congressional mandate to the states pursuant to Congress' section 5 power; second, that it involved remedial legislation; and third, that the "substantially related to important government interests" test adopted by the *Metro Broadcasting* majority was not adopted by a majority in *Fullilove*. *Metro Broadcasting*, 110 S.Ct. at 3031-32 (O'Connor, J., dissenting). As discussed below, those points do not provide a basis to distinguish *Fullilove* from the instant case.

states' actions and prevent the states from violating the Equal Protection clause. *Id.*

But the majority rejected this narrow view of the basis for judicial deference to Congressional determinations in the area of equal protection. *Metro Broadcasting*, 110 S.Ct. at 3008, n.11. Indeed, the holding in *Fullilove* demonstrates that judicial deference to Congress' determinations when enacting remedial legislation to correct racial discrimination extends beyond review of legislation governing state action. The set-aside program at issue in *Fullilove* applied not only to states, but also to private parties. Accordingly, Chief Justice Burger's opinion, observing that Congress enacted the minority set-aside requirement under "an amalgam of its specifically delegated powers", *Fullilove*, 448 U.S. at 473 (Burger, C.J.), looks to section 5 of the Fourteenth Amendment to find affirmative power in Congress to correct the continuing effects of racial discrimination in the procurement practices of state and local governments, *id.* at 476, and to the Commerce Clause for the power to correct such effects in the practices of prime contractors on federally funded public works projects. *Id.* at 475-76, *citing Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964); *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976). The Chief Justice finds that in either case, Congress has special powers to remedy racial discrimination:

> "It is fundamental that in no organ of government, state or federal, does there repose a more comprehensive remedial power than in the Congress, expressly charged by the Constitution with competence and

> authority to enforce equal protection guarantees. Congress not only may induce voluntary action to assure compliance with existing federal statutory or constitutional antidiscrimination provisions, but also where Congress has authority to declare certain conduct unlawful, it may, as here, authorize and induce state action to avoid such conduct.

Fullilove, 448 U.S. at 483-84 (Burger, C.J.) (referring back to discussion of Congress' power under the Commerce Clause, section 5 of the Fourteenth Amendment, and the Fifteenth Amendment). *See id.* at 490-91 (corresponding need for judicial deference).

Similarly, the concurring opinion of Justice Powell identified a broad base for Congress' power to "address directly [i.e. without the mandate of a court] the problems of [racial] discrimination in our society." *Id.* at 499. (Powell, J., concurring) Justice Powell saw Congress' power to address racial discrimination by private parties, when acting under its Commerce Clause power, as informed by Congress' authority to identify and address such discrimination under the Thirteenth, Fourteenth and Fifteenth Amendments. *Id.* at 499 - 501. Finally, the concurrence of Justice Marshall, joined by Justices Brennan and Blackmun, envisioned Congress' power to legislate for the purpose of remedying the present effects of past discrimination as presenting the converse situation to discrimination against "discrete and insular minorities" identified in Footnote Four

of the *Carolene Products* case.[3] Thus, strict scrutiny "is inapposite to racial classifications that provide benefits to minorities for the purpose of remedying the present effects of past discrimination." *Fullilove*, 448 U.S. at 518 (Marshall, J., concurring in the judgment).

Moreover, since *Fullilove*, this Court has reiterated that Congress is particularly suited to identify racial inequity and devise an appropriate remedy. As Justice Scalia observed in *Croson*: "A sound distinction between federal and state or local action based on race rests not only on the substance of the Civil War Amendments, but upon social reality and governmental theory." *Croson*, 488 U.S. at 522 (Scalia, J., concurring in the judgment). Justice Scalia noted that Congress, as the national legislature, is less likely to be dominated by a particular political faction that might engage in racial oppression, *id.* at 523, *citing* The Federalist No. 10, pp 82-84, and that historically, Congress, representing the national society, has led the fight for racial justice. *Croson*, 488 U.S. at 522 (Scalia, J., concurring)[4]; *Metro Broadcasting*, 110 S.Ct. at 3008-09.

In asking the Court to impose, on Congress' enactment of legislation designed to remedy past racial

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[3] *United States v. Carolene Products*, 304 U.S. 144, 152-53, n.4 (1938)

[4] In contrast, Justice O'Connor noted in *Croson* that Justice Marshall's *Fullilove* argument -- that legislation favoring "discrete and insular minorities" does not implicate the *Carolene Products* concerns that motivate strict scrutiny -- loses its force at the local level, where minorities may well be majorities in the government. *Croson* at 495-96 (O'Connor, J.).

discrimination in federal procurement, a strict scrutiny standard equal to that imposed on state and local government in *Croson*, petitioner effectively demands reversal of both *Fullilove* and *Metro Broadcasting*, and complete disregard of the basic principle of deference to Congress' power under the Reconstruction Amendments on which those key decisions rest.

B. The Reconstruction Amendments grant Congress substantive power to identify equal protection violations as well as power to remedy them.

As *Fullilove* recognizes, section 5 of the Fourteenth Amendment, and the parallel enforcement provisions of the Thirteenth and Fourteenth Amendments, confer not only remedial but substantive power on Congress to identify conduct endangering those guarantees of equal protection even where the Court has not done so and without regard to whether the Court would so find. The Reconstruction Amendments thus grant Congress the power to go beyond the Court in advancing the cause of "discrete and insular minorities," and require complementary deference by the Court to Congress' determinations in this area.

The seminal expression of this separation-of-powers principle is *Katzenbach v. Morgan*, 384 U.S. 641 (1966). The Court there upheld section 4(e) of the Voting Rights Act, which prohibited imposition of literacy requirements for voting on persons educated in a public or accredited private school in which the language of instruction was other than English. Finding that section 4(e) was a proper exercise of Congress' power under section 5 of the Fourteenth

Amendment, the Court held that Congress' section 5 power is not only remedial, but substantive. Congress is not confined to remedying violations of the Equal Protection clause identified by the courts; indeed, Congress may identify a threat to equal protection and act to remedy it "without regard to whether the judiciary would find [an equal protection violation]". *Id.* at 649. "Correctly viewed, § 5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment." *Id.* at 651. *Accord, Croson*, 488 U.S. at 490 (O'Connor, J.) ("Congress, unlike any State or political subdivision, has a specific constitutional mandate to enforce the dictates of the Fourteenth Amendment. The power to 'enforce' may at times also include the power to define situations which Congress determines threaten principles of equality and to adopt prophylactic rules to deal with those situations.").

The *Morgan* Court held that the proper test of the affirmative reach of Congress' power under section 5 was that set out in *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316 (1819), to describe Congress' powers under the Necessary and Proper Clause. *Morgan*, 384 U.S. at 650. [5] *Morgan* noted that this same broad test had been held to define Congress' power under similar language in the Fifteenth and Eighteenth Amendments. *Morgan*, 384 U.S.

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[5] "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." *Morgan*, 384 U.S. at 650, *quoting McCulloch*, 17 U.S. at 421, and *citing Ex parte Virginia*, 100 U.S. 339, 345-46 (1880).

at 651. In renowned Footnote Ten, the Court held that Congress' power to enforce the Equal Protection clause is a one-way ratchet: Congress can act to protect, but has no power under section 5 "to restrict, abrogate, or dilute," the rights guaranteed by the Fourteenth Amendment. *Id.* at 651, n.10.

The holding of *Morgan* confirms what Footnote Ten says: that Congress' power to go beyond the authority of the Court is limited to situations where Congress acts to advantage the "discrete and insular minorities" that are inadequately represented in the political process and were therefore the focus of the Court's concern in *Carolene Products*. Requiring that New York's Puerto Rican population be allowed to vote effectively diluted the voting power of other voters in New York.[6] Yet no member of the Court except Justice Douglas was concerned about this question. *See Morgan*, 384 U.S. at 658-59 (Douglas, J., concurring in part) (noting possible challenge to section 4(e) on equal protection grounds by other voters). The majority found that such concern was not applicable because the Congressional measure enfranchised a disadvantaged minority. *Morgan*, 384 U.S. at 657. The Court explained that in the exercise of its powers under the Reconstruction Amendments Congress may apply the *Carolene Products* principle in favor of disadvantaged minorities, just as the Court itself does in conducting Equal Protection review where the legislation disadvantages such groups. *Ibid.*,

[6] See *Oregon v. Mitchell*, 400 U.S. 112, 208 n.88 (1970) (Harlan, J.) ("Lowering of voter qualifications dilutes the voting power of those who could meet the higher standard...")

citing id. at 654-55 n.15.[7] In short, Footnote Ten of *Morgan* is to Congress as Footnote Four of *Carolene Products* is to the Court: a specific recognition of authority and responsibility to protect the rights of those disadvantaged in the political process.

Morgan directly supports deference to Congressional findings of racial discrimination, in a way markedly similar to *Fullilove*. The Court in *Morgan* deferred to Congress' determination that the legislation was needed to prevent discrimination in public services. *See id.* at 652 (hypothesizing various sufficient findings Congress might have made). Indeed, the deference inherent in the *Morgan* holding is made clear by the dissent's focus on the lack of "factual data" in the legislative record. *See Morgan*, 384 U.S. at 669 (Harlan, J., dissenting).[8]

[7] *Korematsu v. United States*, 323 U.S. 214 (1944), is an example of the Court applying strict scrutiny to government discrimination against a racial minority -- the internment of American citizens of Japanese ancestry. Thus, contrary to petitioner's assertions, it does not support strict scrutiny of remedial legislation enacted by Congress.

[8] The historical background of the Reconstruction Amendments also supports judicial deference to Congress in remedial legislation. As commentators have recognized, the post Civil War Congress "... desired to secure the stated guarantees against a future unsympathetic Congress as well as the courts." John E. Nowak and Ronald D. Rotunda, Constitutional Law at 913. "The history will always be unclear, for the drafters had no reason to anticipate a time when the Court might be more liberal in granting and enforcing fourteenth amendment rights than the Congress.... Congress at this time was dominated by the Radical Republicans, who viewed themselves as the principal protectors of the recently freed slaves. The only Supreme Court that the members of Congress knew was a Court which had not applied the Bill of Rights to the States; had not assisted in giving the protection of the law to the abolitionists in the South prior to the War; had enforced the fugitive slave laws; and had invalidated

In *Oregon v. Mitchell*, 400 U.S. 112 (1970), the Court unanimously upheld Congress' power to bar literacy tests for voter qualification on the ground that such tests discriminate against voters on account of race, even while it refused to defer to Congress' lowering of state voting age requirements. Justice Black's crucial opinion in that case clearly states that Congress' powers to enforce the Reconstruction Amendments are broadest when racial discrimination is at issue. "Where Congress attempts to remedy racial discrimination under its enforcement powers, its authority is enhanced by the avowed intention of the framers of the Thirteenth, Fourteenth and Fifteenth Amendments." *Mitchell*, 400 U.S. at 129, *see id.* at 127-129 (opinion of Black, J.). Justice Stewart agreed. *Compare id.* at 296 (opinion of Stewart, J.) (state regulations on voting age "do not invidiously discriminate against any discrete and insular minority" and therefore are beyond Congress' power under section 5) *with id.* at 282-84 (opinion of Stewart, J.) (literacy test ban is directed at preventing racial discrimination and therefore is within Congress' enforcement power under the Fifteenth Amendment and subject only to rational basis review by the Court).

Mitchell arguably narrows the congressional power and corresponding judicial deference in the equal protection area recognized in *Morgan* to situations where, as in the instant case, Congress has identified a threat to *racial* equality under law and has imposed a remedy. *See Mitchell*, 400 U.S. at 146 (opinion of Douglas, J.) (*Morgan* noted that section 4(e) could be sustained as remedying racial

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congressional legislation limiting the expansion of slavery into new territories." *Ibid.*

discrimination), *id.* at 132-33 (opinion of Black, J.) (same). But *Mitchell* confirms Congress' broad substantive powers and corresponding judicial deference in that situation. Indeed, all the Justices held in *Mitchell* that prohibiting literacy tests was a valid exercise of Congress' power under the enforcement clauses of the Fourteenth or Fifteenth Amendment, regardless of whether they viewed federal elections as a federal or state function. The Court apparently unanimously believed that the principle of judicial deference where Congress identifies and acts to remedy racial discrimination applies equally to Congress' imposition of a remedy on the federal government as it does to Congress' imposition of such a remedy on the states. *See Mitchell*, 400 U.S. at 117-18 (opinion of Harlan, J.) (summarizing the various opinions).[9]

C. The Thirteenth Amendment provides a specific textual mandate requiring judicial deference to Congress' determinations in legislating to eradicate the continuing effects of past racial discrimination.

As this Court has recognized for over a century, the enforcement clause of the Thirteenth Amendment "clothes

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[9] In *Heller v. Doe*, 113 S.Ct. 2637 (1993), respondents argued that Congress can confer on a disadvantaged group other than a racial minority special equal protection status denied by the Court. Although the Court declined to address this issue, *id.* at 2642, Justice Souter in dissent noted respondents' reliance on *Morgan* to support Congress' authority to raise the disabled to a "suspect class" in enacting the Americans with Disabilities Act. 113 S.Ct. at 2650-51, n.1 (Souter, J., dissenting). *See generally*, C. Guevara, *The Principled Way, A Path to Heightened Scrutiny for People with Disabilities* (Dec. 1994) (unpublished, lodged with the Court).

Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States," *Civil Rights Cases*, 109 U.S. 3, 20 (1883). Congress' enactments under the Thirteenth Amendment are subject only to rational review by the Court. *Jones v. Alfred E. Mayer Co.*, 392 U.S. 409, 440 (1968) ("Surely Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation."). Thus, where, as here, Congress enacts remedial legislation to eradicate continuing effects of past racial discrimination, the Thirteenth Amendment provides an express grant of power to Congress at least equivalent to Congress' power under section 5 and requiring at least equal deference by the Court.

In the Court's first opinion addressing the Thirteenth Amendment, the Court recognized Congress' power to eradicate racial discrimination with respect to the exercise of those "fundamental rights which are the essence of civil freedom," first among which was the "right to make and enforce contracts" that is at issue in this case. *Civil Rights Cases*, 109 U.S. at 22. The Court held, however, that the Thirteenth Amendment did not empower Congress to bar racial discrimination in public accommodation as a "badge of slavery", on the today-astonishing ground that at the time the Thirteenth Amendment was adopted, "free colored people" did not experience such discrimination as an "invasion of [their] personal status as a freeman." *Id.* at 25.[10]

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[10] *See Planned Parenthood of Southeastern Pennsylvania v. Casey*, 112 S.Ct. 2791, 2812-13 (1992) (discussing repudiation of this view in *Brown v. Board of Education*, 347 U.S. 483 (1954))

In his prescient and eloquent dissent, the first Justice Harlan argued that the Thirteenth Amendment gave to Congress power to define and remedy "badges and incidents of slavery," *Civil Rights Cases*, 109 U.S. at 36-37 (Harlan, J., dissenting), and that where Congress legislates under that power to protect the rights of racial minorities, the Court should defer to Congress' action. *Ibid*; *see also id.* at 50-51 (judicial deference to Congress' similar Fifteenth Amendment authority). Justice Harlan's equally enlightened dissent in *Plessy v. Ferguson*, 163 U.S. 537 (1896), in which the Court upheld state law segregation in public transport, makes clear that he saw Congress' Thirteenth Amendment power to identify "badges and incidents of slavery" as a one-way ratchet. Congress could not prevent the Court from identifying and removing other "badges and incidents," rather, both branches were entrusted by the Reconstruction Amendments with the responsibility to protect the rights of racial minorities. *Plessy*, 163 U.S. at 554-55, 564 (Harlan, J., dissenting).

Almost a century after the *Civil Rights Cases*, in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), the Court adopted Justice Harlan's view of Congressional power under the Thirteenth Amendment, holding that it gives Congress power to identify "badges and incidents of slavery" even where the Court has not, and to pass legislation "necessary and proper" to eliminate them, subject to rational basis review by the Court. 392 U.S. at 439-40. The Court held that the scope of Congress' power under the Thirteenth Amendment, as under the Fourteenth, is defined by the *McCulloch* test. *Id.* at 443-44. Describing the history of the Thirteenth Amendment, and the Civil Rights Act of 1866 which it authorized, the Court held that the legislative

history confirms the plain language of the Amendment and the statute: the enacting Congress intended that they reach beyond state action to encompass private discrimination, as well as discrimination by states. *Id.* at 422- 37, *see also General Contractors Ass'n, Inc. v. Pennsylvania*, 458 U.S. 375 (1982).

This Court has recognized Congress' power under the Thirteenth Amendment to require federal action to eradicate the legacy of racial discrimination, a power as broad as Congress' power to require state action to eradicate the legacy of racial discrimination under section 5 of the Fourteenth Amendment. In *Hurd v. Hodge*, 334 U.S. 24 (1948), argued and decided together with *Shelley v. Kraemer*, 334 U.S. 1 (1948), the Court held that Congress had authority to impose on the District of Columbia, a federal enclave, the same equal protection requirements as on the states, *Hurd*, 334 U.S. at 33, n.14, and that Congress could prevent federal courts from enforcing racially discriminatory covenants to the same extent that it could bar state courts from doing so. *See id.* at 35-36.[11] *See also Jones v. Mayer*, 392 U.S. at 417-19.

Just as Congress under the Fourteenth Amendment has one-way power to require affirmative action by states, so Congress under the Thirteenth Amendment has one-way power to go beyond simply mandating strict racial equality

[11] The Court based its holding in *Shelley* on the Fourteenth Amendment and on Section 1 of the Civil Rights Act of 1886, as amended in 1870 pursuant to Congress' authority under section 5 of the Fourteenth Amendment. In *Hurd*, the Court relied on Section 2 of the same Act (enacted under the Thirteenth Amendment), and found its holding in *Shelley* closely analogous. *Hurd*, 334 U.S. at 33.

in private or federal action that affects basic rights, including the right to contract, in the interest of eradicating "badges or incidents of slavery." As noted, the text of the Amendment itself grants express power to protect the rights of racial minorities; the Amendment is not race-neutral, nor do we need a Footnote Ten to understand, as the first Justice Harlan saw, that Congress' power thereunder is only to advance, not oppress, such "discrete and insular minorities." Modern Thirteenth Amendment jurisprudence includes the proposition that Congress' power encompasses the prohibition of racial discrimination in the making and enforcing of private contracts, *Runyon v. McCrary*, 427 U.S. 160 (1976), while allowing affirmative action by private employers, *United Steelworkers v. Weber*, 443 U.S. 193 (1979). And Congress' Thirteenth Amendment power extends to create, in 42 U.S.C. §1985(3), a special federal remedy for racial minorities against "conspiratorial, racially discriminatory private action aimed at depriving them of the basic rights that the law secures to all free men." *Griffin v. Breckenridge*, 403 U.S. 88, 105 (1971).

This view of Congress' power under the Thirteenth Amendment is buttressed by the Court's jurisprudence describing Congress' power under the Fifteenth Amendment. Like the Thirteenth Amendment, the text of the Fifteenth contains an express one-way grant of authority to Congress to protect the voting rights of racial minorities. And like the Thirteenth Amendment, the Fifteenth is binding on the federal government as well as on the states. The leading modern case on the Fifteenth Amendment, *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), incorporates a vision of Congress' substantive and remedial authority to protect the voting rights of racial minorities equivalent to that

enunciated that same Term in *Morgan* for Congress' powers under the Fourteenth Amendment. *South Carolina v. Katzenbach*, 383 U.S. at 325-27.

Similarly, in *City of Rome v. United States*, 446 U.S. 156 (1980), the Court held that "under §2 of the Fifteenth Amendment, Congress may prohibit practices that ... do not violate §1 of the Amendment." *Id.* at 177. Subject only to rational basis review, Congress may determine that certain voting rights provisions are "appropriate methods of attacking the perpetuation of earlier, purposeful racial discrimination, regardless of whether the practices they prohibit were discriminatory only in effect." *Id.* at 176-77. In certain circumstances, the Court has upheld the use of racial criteria by a state pursuant to the Voting Rights Act to advance the voting rights of racial minorities. *United Jewish Organizations of Williamsburgh, Inc. v. Carey*, 430 U.S. 144 (1977).[12] Congress can thus identify threats to minority voting rights even where the Court has not and can authorize race-conscious remedial measures.

D. Congress' determination of the need for race-conscious legislation to remedy racial discrimination by the federal government is entitled to deference and should be upheld.

As the dissent in *Metro Broadcasting* stated, this Court has "repeatedly recognized that the [federal] Government possesses a compelling interest in remedying the effects of identified racial discrimination." *Metro Broadcasting*, 110 S.Ct. at 3033 (O'Connor, J., dissenting).

[12] *Cf. Shaw v. Reno*, 113 S.Ct. 2816, 2829 (1993) (discussing *UJO*).

Indeed, as the dissent noted, Congress "clearly" has the power to adopt "narrowly tailored race-conscious measures ... to remedy discrimination in the [federal] allocation of broadcasting licenses." *Id.*, *see also id.* at 3036 ("The remedial interest may support race classifications because that interest is necessarily related to past racial discrimination.")[13] Thus, in the context of remedial legislation enacted by Congress, it makes little difference whether the Court requires a "compelling" or merely a "substantial" interest - remedying past racial discrimination, including racial discrimination by the federal government, meets either test. *Fullilove*, 448 U.S. at 492 (Burger, C.J.) (remedial program at issue would meet the strict scrutiny standard set out in *Bakke*); *Wygant v. Jackson Board of Education*, 476 U.S. 267, 268 (1986) (O'Connor, J., concurring) ("[A]s regards certain state interests commonly relied upon in formulating affirmative action programs, the distinction between a 'compelling' and an 'important' governmental purpose may be a negligible one.")

Similarly, in reviewing the fit between a race-conscious remedy chosen by Congress and the racial discrimination which Congress sought to remedy, *Fullilove* establishes a test which does not depend on whether the fit is termed "narrow" or "substantial": Has Congress "adopted means to ensure that the award of a particular preference advances the asserted [remedial] interest." *Metro Broadcasting*, 110 S.Ct. at 3039 (O'Connor, J., dissenting), *citing Fullilove*, 448 U.S. at 487-88 (Burger, C.J.) and

[13] In *Metro*, the race-conscious legislation at issue was not adopted for any remedial purpose, and the dissent argued that it therefore was not intrinsically related to race, as remedial legislation would be. *Id* at 5071.

Croson, 488 U.S. at 488-89 (O'Connor, J.). *See generally Wygant v. Jackson Board of Education*, 476 U.S. at 287 (O'Connor, J., concurring). ("[T]he Court is ... in accord in believing that a public employer, consistent with the Constitution, may undertake an affirmative action program ... which implements [a remedial] purpose by means that do not impose disproportionate harm on ... individuals directly and adversely affected...). Whatever adjectives are chosen to describe the "fit," the issue is at bottom whether Congress has adopted procedures to ensure that those charged with implementing the program, and those potentially adversely affected by it, may in a particular instance rebut through the administrative process the general findings Congress made in adopting the remedial program, and show that the particular award does not advance the asserted remedial interest, and therefore imposes disproportionate harm on nonminorities. *Fullilove*, 448 U.S. at 487-89 (Burger, C.J.).[14]

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[14] States using federal highway transportation funds on state projects are required to follow procedures established under 49 C.F.R., Part 23, and provide, *inter alia*, a certification process for challenging the status of a business as a "disadvantaged business enterprise." For example, as required under 49 C.F.R. § 23.69(a), Maryland has a program providing that "[a]ny individual or organization may challenge the socially and economically disadvantaged status of any individual presumed to socially and economically disadvantaged if that individual is an owner of a Maryland certified disadvantaged or minority business enterprise." Manual on Federal Disadvantaged and Minority Business Enterprise Program, Maryland Department of Transportation, at 96 (1993). (copy lodged with the Court). Under Maryland's program, a certified entity may be decertified if the firm does not meet certification standards as a disadvantaged/minority business enterprise. *See id.* at 47. *See also, eg.* N.J.S.A. 52:32-17 *et seq.* (1985).

Of far greater significance than the words used to describe the standard of judicial review is the type of factfinding that the Court will require of Congress in identifying continuing effects of past racial discrimination. On this point *Fullilove* expresses a clear consensus from which the Court has not retreated: "Congress, of course, may legislate without compiling the kind of 'record' appropriate with respect to judicial or administrative proceedings." *Fullilove*, 448 U.S. at 478 (Burger, C.J.). When Congress enacts legislation, it is permitted to rely upon historical documentation and previous congressional findings and investigations; it is not necessary for Congress to make specific findings for each individual piece of legislation. *Ibid.; id.* at 502-503 (Powell, J., concurring); *Metro Broadcasting*, 110 S.Ct. at 3013. *See Metro Broadcasting*, 110 S.Ct. at 3031 (O'Connor, J., dissenting) (affirming *Fullilove*); *id.* at 3043 ("Congress' "considered judgment [is] embodied in measures crafted through the legislative process and subject to hearings and deliberation").

Petitioner and its amici argue that Congress did not create a sufficient factual record to support its determination of racial discrimination in federal contracting. They would require "empirical support," and "evidence" in the record, *see eg.* Pet. Br. at 35, to support Congress' express findings in the Act of prior discrimination in federal contracting. Setting aside for the moment the fact that in *Fullilove* itself the Court reviewed and held more than sufficient Congress' determination of racial discrimination *in federal construction contracting*, *Fullilove*, 448 U.S. at 477-78 (Burger, C.J.); *accord*, *Metro Broadcasting*, 110 S.Ct. at 3031 (O'Connor, J., dissenting) (in *Fullilove* "Congress had identified discrimination that had particularly affected the construction

industry"), petitioner's crabbed view of Congress' power misapprehends the nature of the legislative process and Congress' role in the Constitutional system.

Under the standard proposed by petitioner, legislative bodies would be required to make specific findings of fact, based solely on evidence in the "record" that could be demonstrated to be true with the kind of certainty that is only possible in the physical sciences.[15] Indeed, legislative enactments would be subject to a stricter standard of review than decisions of a trial court. While findings of a trial court must be upheld unless "clearly erroneous," *Anderson v. Bessemer City*, 470 U.S. 564 (1985), petitioner would require that Congress' legislative determinations in this area not be upheld unless specific evidence in the record demonstrates to a virtual certainty that they are correct.[16] In short, petitioner demands judicial review that would always be "strict in theory, but fatal in fact." *Fullilove*, 448 U.S. at 507 (Powell, J.). The Court has never subjected remedial Congressional legislation to such a standard.

The institutional characteristics of Congress indeed require that it not be so hamstrung, for Congress is far more able than the judiciary to engage in long-term factual determinations regarding the continuing existence of effects of past discrimination, and to revise and monitor remedial

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[15] Petitioner argues that such factfinding is required whether the standard of review is strict or intermediate scrutiny, *compare* Pet. Br. at 35 *with id.* at 43.

[16] One amicus describes the proposed standard by saying that Congress' determinations should be subject to the same scrutiny as the allegations of a Title VII plaintiff. Br. of Ass'd General Contractors at 23.

legislation.[17] First, Congress is not confined to relying on the parties (or amici) in a particular proceeding, nor is Congress confined in acquiring information by judicial rules of evidence. The Constitution anticipates that as the representative of the people, Congress, unlike a court or the executive, acquires information from the collective daily contacts and personal experiences of its elected members. Legislators and their staffs accumulate an understanding of a situation exceeding that any individual judge could hope to gain. "Congress has no responsibility to confine its vision to the facts and evidence adduced by particular parties. Instead, its special attribute as a legislative body lies in its broader mission to investigate and consider all facts and opinions that may be relevant to the resolution of an issue." *Fullilove*, 448 U.S. at 502-03 (Powell, J., concurring).

Second, Congress continues to acquire experience and knowledge about a particular problem over time. Congress inherently relies on "information and expertise that [it] acquires in the consideration and enactment of earlier legislation." *Fullilove*, 448 U.S. at 503 (Powell, J., concurring); *see also id.* at 478 (Burger, C.J.) ("Congress had abundant historical basis from which it could conclude that traditional procurement practices, when applied to minority businesses, could perpetuate the effects of prior discrimination.").

These advantages are particularly relevant to findings regarding the continuing effects of past discrimination such

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[17] *See generally* Note, *Principles of Competence: The Ability of Public Institutions to Adopt Remedial Affirmative Action Plans*, 53 U.Chi. L.Rev. 581, 602-06 (1986).

as those at issue here. Congress is in a better position than the Court to identify racial discrimination by the federal government and government perpetuation of private discrimination, given its oversight of federal programs. Congress as a representative body is in a better position than the Court to gauge the present effects of present or past racial discrimination in federal programs, through the feedback legislators receive from their constituencies. Congress is in a better position than the Court to reassess and reevaluate remedial legislation on a regular basis, and is indeed impelled to do so by the regular prospect of elections. *See Fullilove*, 448 U.S. at 489 (Burger, C.J.) (set-aside "subject to reassessment and reevaluation by Congress").

E. This Court should not abandon the long-standing principle of deference to Congress' factfinding in identifying and remedying racial discrimination.

In attempting to extend the theory set out in *Croson* to Acts of Congress, petitioner asks the Court to abandon its long-held view of Congress' authority under the Reconstruction Amendments, and abruptly to alter the respective powers of Congress and the Court in this area.

Petitioner's basis for such a drastic change in basic Constitutional rules is remarkably short on authority. Petitioner ignores the many decisions of this Court which expressly rest on deference to Congress' factfinding in the exercise of its power under the Reconstruction Amendments, and attempts to construct an argument for strict scrutiny out

of a few phrases in *Fullilove*. Pet. Br. at 24-27.[18] Indeed, the shallowness of petitioner's legal argument indicates that petitioner is simply asking the Court to make a "basic change in the law upon a ground no firmer than a change in ... membership." *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 112 S.Ct. 2791, 2814 (1992) (citations omitted). As *Casey* emphasized, such a result is "unjustifiable ... under principles of stare decisis." *Id.* at 2814. More fundamentally, where as here, the issue is rooted in "an intensely divisive [national] controversy," to overrule established precedent "would subvert the Court's legitimacy beyond any serious question." *Id.* at 2815.

Congress' authority under the Reconstruction Amendments to identify and remedy racial discrimination is the direct result of the most "intensely divisive controversy" of this nation: the Civil War. The Court's repeated affirmance of Congress' special powers under those Amendments has provided a firm ground for federal remedial civil rights legislation in many areas.[19] As the Court recognized in *Casey*, in the area of civil rights, as in that of abortion, implementation of the Constitutional principles announced by the Court has come at a uniquely high price of "criticism, ostracism, or...violence." *Casey*,

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[18] Petitioner's use of language in *Fullilove* while disregarding the holding of the case exemplifies a practice this Court strongly criticized in its first two opinions this Term. *United States v. Shabani*, 63 USLW 4001, 4002 (1994); *U.S. Banccorp Mortgage v. Bonner Mall*, 63 USLW 4005, 4007 (1994).

[19] Federal mandates have in turn been crucial in making effective state remedial programs. *See, eg.* State of New Jersey, *Governor's Study Commission on Discrimination in Public Works Procurement and Construction Contracts* at 31 (1993)(copy lodged with the court).

112 S.Ct. at 2815 (discussing implementation of *Brown v. Board of Education*, 347 U.S. 483 (1954) and *Roe v. Wade*, 410 U.S. 113 (1973)). The Court has a corresponding obligation. "To all those who will be so tested by following, the Court implicitly undertakes to remain steadfast, lest in the end a price be paid for nothing." *Id.*

The Court must act with particular care where, as here, it is asked to disrupt the balance of power between the Court and Congress and to make new rules for Congress to live under. Changing the rules on a coequal branch is an inherently suspect enterprise, and one which should be undertaken only pursuant to a clear Constitutional mandate. Here, on the contrary, the Constitution and the Court's prior decisions consistently grant Congress special power and require corresponding judicial deference to Congress' identifying and remedying racial discrimination. Petitioner presents no legitimate basis to depart from that authority.

CONCLUSION

For the reasons stated above, amici states urge the Court to affirm the Tenth Circuit's decision in this case.

Respectfully submitted,

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No. 93-1841

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

ADARAND CONSTRUCTORS, INC.,
Petitioner,
v.

FEDERICO PEÑA, SECRETARY OF DEPARTMENT OF TRANSPORTATION, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF OF LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, AMERICAN CIVIL LIBERTIES UNION, WOMEN'S LEGAL DEFENSE FUND, NATIONAL WOMEN'S LAW CENTER AND NATIONAL COUNCIL OF LA RAZA AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF THE *AMICI CURIAE*

The Lawyers' Committee for Civil Rights Under Law (Lawyers' Committee) is a national civil rights organization formed in 1963 by leaders of the American bar at the request of President Kennedy, to provide legal representation to African-Americans who were being deprived of their civil rights. The Lawyers' Committee and its local affiliates have represented the interests of African-

Americans, Hispanics and women in hundreds of class actions relating to employment discrimination, voting rights, housing, equalization of municipal services and school desegregation.

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and equality embodied in the Constitution. Since its founding in 1920, the ACLU has played an active role in the battle for racial justice and has long supported the constitutionality of affirmative action in appropriate circumstances.

The Women's Legal Defense Fund (WLDF), founded in 1971, is a national advocacy organization that works to develop and promote policies to help women achieve equal opportunity, quality health care, and economic security for themselves and their families. Over its 23-year history, WLDF has placed special emphasis on workplace discrimination issues, including sexual harassment, pay equity and affirmative action.

The National Women's Law Center (Center) is a nonprofit legal advocacy organization dedicated to the advancement and protection of women's rights and the corresponding elimination of sex discrimination from all facets of American life. Since 1972, the Center has actively sought to remedy sex discrimination and secure the rights of women, and has participated in major Supreme Court cases addressing women's rights.

The National Council of La Raza (NCLR) is a private, nonprofit corporation dedicated to reducing poverty within, and discrimination against, the Hispanic community. NCLR is the largest constituency-based national Hispanic organization, and serves all Hispanic nationality groups in all regions of the country. NCLR represents nearly 200 formal affiliates—local community-based Hispanic organizations—who together serve more than two

million Hispanics annually in 37 states, Puerto Rico and the District of Columbia.[1]

STATEMENT OF FACTS

In 1975, Congress found that pervasive discrimination had formed a barrier against the creation of minority-owned businesses and had decreased the opportunities available to those minority-owned businesses that had managed to overcome that barrier.[2] In response to those findings, Congress established for federal agencies a minimum goal of five percent participation by disadvantaged business enterprises ("DBEs") in federal contracting programs.[3] DBEs are defined by statute as economically and socially disadvantaged enterprises, and minority-owned businesses are presumed (subject to rebuttal) to be such enterprises.[4] Nonminorities may qualify for the DBE designation if they meet the criteria for social and economic disadvantage.

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[1] The parties have consented to the filing of this brief. Letters of consent are on file with the Clerk of the Court.

[2] Minority Enterprise and Allied Problems of Small Business, H.R. Rep. No. 468, 94th Cong., 1st Sess. (1975).

[3] The Small Business Act of 1978 (SBA), Pub. L. No. 95-507, 92 Stat. 1770, 15 U.S.C. § 644(g)(2) (1988 & Supp. IV 1992).

[4] 15 U.S.C. § 637(d) (§ 8(d) of the SBA); 15 U.S.C. § 637(a) (§ 8(a) of the SBA); Surface Transportation and Uniform Relocation Assistance Act of 1987 (STURAA), Pub. L. No. 100-17, 101 Stat. 144. It is unclear from the record which statutory framework petitioner is challenging. The courts below appear to have assumed that Gonzales Construction Co., the company that was awarded the guardrail subcontract over petitioner, benefitted from the presumption in favor of minorities in its certification as a DBE, and thus in this brief we assume the same. This brief addresses the presumption contained in STURAA, as STURAA was the source of the funding for the program at issue. Petitioner's Brief at 3-4. The outcome of our analysis would not be affected by selection of either of the other statutory presumptions.

The Federal Lands Highway Program ("FLHP"), an agency within the Department of Transportation, has implemented Congress' DBE mandate through a Subcontracting Compensation Clause ("SCC") that provides prime contractors additional compensation if they use a minimum percentage of DBEs as subcontractors. The SCC program is one component of Congress' overall scheme to promote the economic integration of minorities into the mainstream economy.[5]

At issue here is a contract awarded by Central Federal Lands Highway Division ("CFLHD"), a regional division of FLHP responsible for highway construction on federal lands in several states. CFLHD does not require that contractors bidding on prime contracts include DBEs in their bids, and it awards contracts to the lowest bidder irrespective of DBE participation. However, contracts used by CFLHD contain the SCC, which provides that if the prime contractor voluntarily subcontracts ten percent or more to a DBE, the prime contractor receives additional compensation for locating, training, utilizing, assisting and developing that DBE.[6] The SCC program is intended to increase DBE subcontracting without imposing any mandatory goals or instituting any quotas.

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[5] The FLHP administered $55 million of the total $740 million Congress appropriated annually, from 1987 to 1991, for federal highway construction. STURAA, 101 Stat. 138 § 103(b)(4)(G), 145 § 106(a)(8).

[6] *See Adarand Constructors, Inc. v. Peña, et al.*, 16 F.3d 1537, 1541 (10th Cir.), *cert. granted*, 115 S. Ct. 41 (1994). The SCC provides that the contractor receives 1.5% of the contract amount for using one DBE, and 2% for the use of two or more DBEs.

SUMMARY OF ARGUMENT

At issue in this case is Congress' power to address the effects of past and continuing discrimination that has hampered the participation of minority businesses in the economy. The issue is not a new one. In *Fullilove v. Klutznick*, 448 U.S. 448 (1980), this Court upheld a race-conscious program enacted by Congress to remedy the effects of racial and ethnic discrimination. Subsequent decisions of this Court, and of every federal appellate court before which the question has been raised, have confirmed that Congress has the power—beyond that of states and other governing bodies--to address, through such programs, the problems caused by past and continuing discrimination.

These decisions properly recognize the unique power granted to Congress by the Reconstruction Amendments. Thus, they apply to race-conscious programs established by Congress in response to discrimination a standard of review that differs from the strict scrutiny applicable to state and local programs. This standard requires the Court to examine carefully such programs and balance the protections of the Fifth Amendment with deference to Congress' enforcement powers under the Reconstruction Amendments. The workable standard articulated by the *Fullilove* majority can and should be applied to uphold the program here at issue.

ARGUMENT

I. THIS COURT HAS CONSISTENTLY AND CORRECTLY RECOGNIZED THAT THE CONSTITUTION GRANTS CONGRESS UNIQUE AUTHORITY TO ENACT RACE-CONSCIOUS PROGRAMS TO ADDRESS THE EFFECTS OF DISCRIMINATION

The economic integration of members of minority groups who have suffered pervasive discrimination in our society continues to be one of the most important and difficult problems our nation must confront.[7] The fundamental issue raised by petitioner—does Congress have authority to use programs that rely on, among other factors, race or ethnicity, in order to ameliorate the dislocation and exclusion from the economic mainstream caused by racial or ethnic discrimination—has already been addressed and resolved by this Court. In *Fullilove*, and subsequent cases, this Court has consistently recognized that the Enforcement Clauses of the Thirteenth, Fourteenth and Fifteenth Amendments to the Constitution enable Congress to establish such programs.

A. *Fullilove* and Its Progeny Have Upheld the Authority of Congress to Enact Race-Conscious Programs and Have Distinguished Congress' Power From That of the States

Fullilove v. Klutznick, 448 U.S. 448 (1980), is this Court's seminal decision addressing Congress' authority to promote the economic rights of minorities affected by this nation's legacy of discrimination. The Court there upheld congressional authority to make "limited use of racial and ethnic criteria," *id.* at 473, to respond to the effects of

[7] "The fact is that racism and prejudice are alive and well in America and have caused us to scale higher heights and labor with greater burdens than that of our fellow majority contractors." *Discrimination in Surety Bonding, Hearing Before the Subcomm. on Minority Enterprise, Finance, and Urban Development of the House Comm. on Small Business*, 103d Cong., 1st Sess. 6 (1993) (testimony of John B. Cruz III).

past and continuing racial and ethnic discrimination.[8] At issue in *Fullilove* was the Public Works Employment Act of 1977 ("PWEA"), which included a requirement that states accepting federal construction funds allocate at least ten percent of such funds for contracts awarded to businesses owned by minorities. Every member of the Court recognized that Congress had broad and unique powers to combat racial discrimination;[9] a clear majority of the Court thought Congress' power was sufficient to uphold the set-aside program at issue in that case.[10]

Chief Justice Burger distinguished Congress' power from that of state and local governments in sweeping terms: "It is fundamental that in no organ of government, state or federal, does there repose a more comprehensive remedial power than in the Congress, expressly charged by the Constitution with competence and authority to enforce equal protection guarantees." *Id.* at 483.[11] Similarly, Justice Powell pointed out:

[8] In addition to finding that racial criteria were acceptable for remedial purposes, the plurality opinion of Chief Justice Burger, joined by Justices White and Powell, also noted that the use of such criteria, if properly limited, was permissible "to effectuate the constitutional mandate for equality of economic opportunity." *Fullilove v. Klutznick*, 448 U.S. 448, 489 (1980). *See also id.* at 463, 490.

[9] *See id.* at 472-73 (opinion of Burger, C.J., joined by White and Powell, JJ.); *id.* at 520 n.4 (opinion of Marshall, J., joined by Brennan and Blackmun, JJ.); *id.* at 526 (opinion of Stewart, J., joined by Rehnquist, J.); *id.* at 548 (opinion of Stevens, J.).

[10] In addition, Justice Stevens, in dissent, distinguished the *Fullilove* program from one, like the program at issue here, in which "[r]ace was used as no more than a factor in identifying the class of the disadvantaged." *Id.* at 535 n.6 (Stevens, J., dissenting).

[11] Chief Justice Burger observed that Congress' authority to enact the program at issue was rooted as well in the Spending and Commerce Clauses. U.S. Const., Art. I, § 8, cl. 1 & 3. Congress may employ the spending power to further these policy objectives, and, where "inequity has an effect on interstate commerce," Con-

> When we first confronted [the] issue [of affirmative action] in *Bakke*, I concluded that the Regents of the University of California were not competent to make . . . findings sufficient to uphold the use of the race-conscious remedy they adopted . . . . *But the issue here turns on the scope of congressional power, and Congress has been given a unique constitutional role in the enforcement of the post-Civil War Amendments.*

Id. at 516 (Powell, J., concurring) (emphasis added).[12]

Nearly a decade after *Fullilove*, in *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), the Court forcefully reaffirmed the *Fullilove* decision and its rationale.[13] In *Croson*, the Court struck down a minority set-aside plan instituted by the City of Richmond. But in so doing, the Court went to great lengths to distinguish the "unique powers" of Congress from the more circumscribed authority of states and municipalities: "Congress, unlike any State or political subdivision, has a specific constitutional mandate" allowing it to "identify and redress the effects

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gress can, through the Commerce Clause, take "necessary and proper action to remedy the situation." *Fullilove*, 448 U.S. at 475. In addition, when using its spending power, "Congress may attach conditions on the receipt of federal funds, and has repeatedly employed the power 'to further broad policy objectives by conditioning receipt of federal moneys upon compliance with federal statutory and administrative directives.'" *South Dakota v. Dole*, 483 U.S. 203, 206 (1987) (quoting *Fullilove*, 448 U.S. at 474).

[12] *See also Fullilove*, 448 U.S. at 499 (Powell, J., concurring) ("Unlike the Regents of the University of California, Congress properly may—and indeed must—address directly the problems of discrimination in our society."); *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 608-09 (1990) ("*Bakke* [was] a case that did not involve congressional action") (O'Connor, J., dissenting).

[13] *See Richmond v. J.A. Croson Co.*, 488 U.S. 469, 490-91 (1989) (opinion of O'Connor, J., joined by Rehnquist, C.J. and White, J.); *id.* at 521-22 (opinion of Scalia, J.); *id.* at 557-58 (opinion of Marshall, J., joined by Brennan and Blackmun, JJ.).

of society-wide discrimination." *Croson*, 488 U.S. at 490. *See generally id.* at 486-93. The logic of such a distinction, according to the Court's opinion, could be found in "[t]he Civil War Amendments themselves[, which] worked a dramatic change in the balance between congressional and state power over matters of race." *Id.* at 490.[14] Justice Scalia, concurring, further articulated the rationale for treating congressional action differently: "A sound distinction between federal and state (or local) action based on race rests not only upon the substance of the Civil War Amendments, but upon social reality and governmental theory." *Id.* at 522 (Scalia, J., concurring). Thus, in *Croson*, this Court again differentiated the broad power of Congress to consider race in enacting programs to ameliorate the effects of past and continuing discrimination from the more limited power of states and other political entities to do so.

The Court embraced this distinction once again in *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990). *Metro Broadcasting* involved a challenge to policies used by the Federal Communications Commission ("FCC") in awarding radio and television broadcast licenses that relied, in part, on race. The Court upheld the programs, attributing "overriding significance . . . [to the fact] that the FCC's minority ownership policies ha[d] been specifically approved—indeed, mandated—by Congress." *Id.* at 563.[15] The Court expressly noted that

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[14] *See also Croson*, 488 U.S. at 491 (opinion of O'Connor, J.) ("Congress may authorize, pursuant to section 5, state action that would be foreclosed to the states acting alone") (citation omitted); *id.* ("[T]he Civil War Amendments granted 'additional powers to the Federal government.'") (citation omitted).

[15] The principal dissent in *Metro Broadcasting* raised the question whether the federal government could rely on its authority under § 5 of the Fourteenth Amendment to justify actions that did not directly implicate the states. 497 U.S. at 606-07 (O'Connor, J., dissenting). While this Court has never so restricted the Enforcement Clauses of the Reconstruction Amendments, *see Patterson v. McLean Credit Union*, 491 U.S. 164, 174 (1989) (noting

"much of the language and reasoning in *Croson* reaffirmed the lesson of *Fullilove* that race-conscious classifications adopted by Congress to address racial and ethnic discrimination are subject to a different standard than such classifications prescribed by state and local governments." *Id.* at 565.

Taken together, *Fullilove*, *Croson* and *Metro Broadcasting* firmly establish the Court's view that Congress has

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with approval that "[i]n recent decades state and federal legislation has been enacted to prohibit private racial discrimination in many aspects of our society"); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 439 (1968) (noting that "the Enabling Clause of [the Thirteenth] Amendment empowered Congress to . . . 'pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States'" including laws prohibiting private discrimination) (quoting *Civil Rights Cases*, 109 U.S. 3, 20 (1883)); *United States v. Guest*, 383 U.S. 745, 762 (1966) ("§ 5 empowers the Congress to enact laws punishing all conspiracies—with or without state action—that interfere with Fourteenth Amendment rights") (Clark, J., concurring), the program at issue here does not raise the concerns articulated by the dissent for at least two reasons.

First, the broadcast licensing policies at issue in *Metro Broadcasting* involved an activity created and exclusively conducted by the federal government for non-remedial purposes. In contrast, the highway construction program challenged here is one that intimately involves the states and does seek to ameliorate the conditions caused by past and continuing acts of discrimination. Indeed, states are directly involved by virtue of their authority to certify DBEs. In addition, highways built by the federal government on federal lands are integrally connected with highways built by the states utilizing federal funds. Since Congress' right to attach conditions to the states' acceptance of such funds has been repeatedly affirmed (*see Fullilove* and cases collected *infra* at note 16), to prohibit Congress from putting similar conditions on money earmarked for highway projects on federal lands would artificially hamstring Congress' ability to pursue the legitimate goal of the integration of all races into the economy.

Second, as in *Fullilove*, the validity of the program challenged here should not be determined solely with reference to Congress' § 5 powers. Rather, in enacting the instant program—as in *Fullilove*—"Congress employed an amalgam of its specifically delegated powers," 448 U.S. at 473, including its power to act directly pursuant to the Spending and Commerce clauses.

the authority—beyond that of other political entities—to make limited use of racial criteria when fashioning programs to redress the effects of discrimination. The clarity of the Court's position on the question of *congressional* authority (as expressed in these cases) is evidenced by the uniformity of subsequent appellate decisions.[16] As Judge Posner explained in one of those cases, *Milwaukee County Pavers Association v. Fiedler*, 922 F.2d 419 (7th Cir.), *cert. denied*, 500 U.S. 954 (1991): "The joint lesson of [*Fullilove* and *Croson*] is that the federal government can, by virtue of the enforcement clause of the Fourteenth Amendment, engage in affirmative action with a freer hand than states and municipalities can do." *Id.* at 423-24.[17]

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[16] *See Harrison & Burrowes Bridge Constructors, Inc. v. Cuomo*, 981 F.2d 50, 56 (2d Cir. 1992) ("The critical distinction between *Croson* and the [plaintiffs'] complaints regarding the federal program is that *Croson* concerned a non-federal program."); *Ellis v. Skinner*, 961 F.2d 912 (10th Cir.) (upholding congressional highway construction program requiring states to set-aside at least 10% of contracts for disadvantaged business enterprises), *cert. denied*, 113 S. Ct. 374 (1992); *Tennessee Asphalt Co. v. Farris*, 942 F.2d 969, 976-77 (6th Cir. 1991) ("[T]he Supreme Court has carefully distinguished between the limitations on efforts of states and their political subdivisions to employ race-consicous remedies to overcome the effects of past and present discrimination and the broader power of Congress to address such problems on a nationwide basis.").

[17] The lower courts' reliance on the clear path marked by *Fullilove* and *Croson* (and reconfirmed in *Metro Broadcasting*) mirrors the reliance that thousands of established and nascent subcontractors have placed on the continuing opportunities the challenged program provides. *See GAO Report to Congressional Requesters*, "Highway Contracting" (Sept. 1992) ("Since 1988, state agencies have received thousands of new applications for participation in the Disadvantaged Business Enterprise Program for federal highways each year."). As this Court has noted, the classic case for weighing reliance heavily in favor of following an earlier rule occurs in the commercial context. *See, e.g., Payne v. Tennessee*, 501 U.S. 808, 828-29 (1991).

B. *Fullilove* and Its Progeny Are Properly Grounded in the Reconstruction Amendments

Fullilove and its progeny correctly recognize that race-conscious programs enacted by Congress must be viewed "against the background of ongoing efforts directed toward deliverance of the century-old promise of equality of economic opportunity." *Fullilove*, 448 U.S. at 463. That promise is contained in the Reconstruction Amendments to the Constitution,[18] whose core principle is the protection of the civil, political and economic rights of minority group members affected by past and present discrimination. The Amendments fundamentally altered the roles of the federal government and the states in guaranteeing this protection by giving to Congress new powers to define and enforce these Amendments,[19] while at the same time withdrawing those powers from the states. *See Croson*, 488 U.S. at 490.[20]

The grant of exclusive enforcement power to Congress is contained in the Enforcement Clauses of the Reconstruction Amendments. The Enforcement Clauses did not merely permit Congress to protect the rights granted in the Amendments—they empowered Congress to "identify unlawful discriminatory practices" and to "prescribe remedies" that would "eradicate their continuing effects." *Fullilove*, 448 U.S. at 502 (Powell, J., concurring). Put simply, the Amendments conferred upon Congress "the

[18] U.S. Const. amend. XIII-XV.

[19] "It is not said the *judicial power* of the general government shall extend to enforcing the prohibitions and to protecting the rights and immunities guaranteed . . . . It is the power of Congress which has been enlarged. Congress is authorized to *enforce* the prohibitions by appropriate legislation." *Ex Parte Virginia*, 100 U.S. 339, 345 (1879) (emphasis in original).

[20] *See also Slaughter-House Cases*, 83 U.S. 36, 68 (1873) (The Reconstruction Amendments conferred "additional powers to the Federal government," and imposed "additional restraints upon those of the States.").

authority to select reasonable remedies to advance the compelling state interest in repairing the effects of discrimination." *Id.* at 510.

The framers of the Reconstruction Amendments distrusted the states to protect the rights contained in the Amendments because "racial discrimination against any group finds a more ready expression at the state and local than at the federal level." *Croson*, 488 U.S. at 523 (Scalia, J., concurring). By selecting Congress as the appropriate repository of the power to enforce the Amendments, the framers embraced the Madisonian theory that the national legislature avoids the parochial interests and factionalism that permeate smaller governmental bodies.[21] As Justice O'Connor stated in *Croson*: the framers refused to "cede control over the content of the Equal Protection Clause to the 50 state legislatures and their myriad political subdivisions." *Id.* at 490.

Race-conscious remedial measures were considered necessary by the very Congress that passed the Fourteenth Amendment. The framers did not intend to nullify race-conscious programs by Congress, and this is evidenced by the enactment of such programs contemporaneously with the passage of the Reconstruction Amendments.[22]

The Freedmen's Bureau Act of 1866,[23] the most visible and comprehensive remedial program during Reconstruction, was debated and approved by the 39th Congress contemporaneously with the passage of the Fourteenth Amendment.[24] Congress sought to "ameliorate the condi-

[21] *See* The Federalist No. 10, at 82-83 (James Madison); The Federalist No. 51, at 322-23 (James Madison) (Clinton Rossiter ed. 1961). *See also Croson*, 488 U.S. at 522-23 (Scalia, J., concurring).

[22] *See generally* Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 Va. L. Rev. 753 (1985).

[23] Ch. 200, 14 Stat. 173 (1866).

[24] The House passed the Fourteenth Amendment on May 10, 1866; the Senate passed a modified version on June 8; and the

tion of the colored man" through the programs administered by the Freedmen's Bureau.[25] Most of the services provided by the Bureau benefitted only African-Americans,[26] and several of the Act's provisions were specifically race-based. For instance, the Act designated abandoned and confiscated land and buildings and the proceeds therefrom "to the education of the freed people" [27] and confirmed sales of land set aside for "heads of families of the African race." [28]

The 40th Congress similarly recognized the propriety and necessity of race-conscious curative legislation when it enacted the Colored Servicemen's Claim Act,[29] which provided federal assistance to African-American servicemen seeking special bounties and other payments promised for their service during the Civil War. Opponents of the Act complained that it conferred benefits on black veterans without regard to their need, in that the Act made no distinction between educated and uneducated African-Americans,[30] but the views of a majority in Congress,

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House accepted the Senate changes on June 13. The House passed the Freedmen's Bureau Act on May 29, 1866; the Senate adopted a modified version on June 26; and the Conference Report was approved on July 2 and 3. Cong. Globe, 39th Cong., 1st Sess. at 2545, 2878, 3042, 3149, 3413, 3524, 3562 (1866).

[25] Cong. Globe, 39th Cong., 1st Sess. 631 (1866) (remarks of Rep. Moulton). The Freedmen's Bureau was broadly empowered to "enable [freedmen] . . . to become self-supporting citizens" and aid them "in making [their] freedom . . . available to them." Ch. 200, 14 Stat. 174.

[26] *See* Report of the Commissioner of the Bureau of Refugees, Freedmen, and Abandoned Lands, H.R. Exec. Doc. No. 11, 39th Cong., 1st Sess. (1865).

[27] Ch. 200, 14 Stat. 174, Sec. 6.

[28] Ch. 200, 14 Stat. 174, Sec. 8.

[29] 15 Stat. 26, Res. 25 (1867).

[30] Cong. Globe, 40th Cong., 1st Sess., 80-81 (1867) (remarks of Sen. Howe).

stressing that *all* African-American soldiers needed protection because they continued to suffer from the effects of past discrimination, prevailed.[31]

In sum, the Reconstruction Amendments provide Congress with comprehensive power to redress the civil, political and economic problems encountered by minorities.

II. THIS COURT SHOULD UPHOLD THE CHALLENGED PROGRAM UNDER THE *FULLILOVE* STANDARD

Although the Reconstruction Amendments transformed Congress' power to employ programs that rely on racial or ethnic distinctions to achieve economic integration, this Court has properly recognized that such power is not boundless. For even though the Amendments granted Congress broad enforcement power, the Fourteenth Amendment's guarantee of Equal Protection, as incorporated in the Fifth Amendment, requires that such programs undergo examination to ensure that they do "not conflict with constitutional guarantees." *Fullilove*, 448 U.S. at 491.

This examination is not, as petitioner suggests, the sort of scrutiny employed by this Court in *Bolling v. Sharpe*, 347 U.S. 497 (1954). *See* Petitioner's Brief at 25. *Bolling*, a companion case to *Brown v. Board of Education*, involved a challenge to the District of Columbia's segregated school system. In imposing racial segregation on schools in the nation's capital, Congress was acting pursuant to its power contained in Article I, Section 7 of the Constitution, to pass legislation for the District. *See Plessy v. Ferguson*, 163 U.S. 537, 545 (1896). There was no claim—nor could there have been—that segregation was intended to advance or protect the civil, political or economic rights or interests of minority group members. This was not action taken by Congress pur-

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[31] *Id.* at 444 (remarks of Rep. Scofield).

suant to the power conferred upon it by the Reconstruction Amendments. Thus, the racial classifications there were invidious and properly "scrutinized with particular care." *Bolling*, 347 U.S. at 499.

That same level of scrutiny is not appropriate here. To the contrary, what the Enforcement Clauses suggest, as the Court recognized in *Fullilove*, is that Congress is entitled to greater latitude and deference when it adopts, as an element of larger economic legislation, curative programs designed to redress the effects of past and continuing discrimination and promote the goals of the Reconstruction Amendments. *Fullilove*, 448 U.S. at 462. While the *Fullilove* standard defies easy labelling,[32] it requires the Court to "inquire whether the *objectives* of the legislation are within the power of Congress" and then decide whether the legislation is an appropriate "*means* for achieving the congressional objectives." *Id.* at 473 (emphasis in original).

A. The Program Reflects the Proper Exercise of Congress' Powers Under the Enforcement Clauses of the Reconstruction Amendments

The program at issue in this case, the SCC program, is a product of the same broad congressional action that the Court considered, and upheld, in *Fullilove*.[33] The SCC program provides compensation to prime contractors who voluntarily elect to subcontract a minimum percentage of their highway construction projects to disad-

[32] Petitioner tries to circumscribe *Fullilove*'s reach as precedent by squeezing the standard articulated by the plurality into the label "strict scrutiny." Petitioner's Brief at 26-27. What petitioner ignores, however, is that regardless of the varying terminologies, the majority found Congress' use of a remedial set-aside program constitutional. Therefore, it is far more productive to glean the fundamental principles applied by the plurality than to try to characterize the standard.

[33] *See* Federal-Aid Highway Act of 1987, S. Rep. No. 4, 100th Cong., 1st Sess. (1987) [hereinafter Highway Act of 1987].

vantaged businesses. The program accepts DBEs certified under several sets of regulations implementing the Small Business Act ("SBA") and the Surface Transportation and Uniform Relocation Assistance Act ("STURAA"). STURAA was modeled on the PWEA, which was at issue in *Fullilove*, and the PWEA, in turn, was modeled on the SBA.[34]

In reviewing the legislative history of the PWEA, Justice Powell declared that "the total contemporary record of congressional action dealing with problems of racial discrimination against minority business enterprises" was relevant in determining whether Congress had sought to remedy the present effects of past discrimination. *Id.* at 503 (Powell, J., concurring).[35] In recognizing the relevance of this broad history, Justice Powell observed that Congress, as the national legislature, may base its actions not only on the immediate record, but also on the "information and expertise that Congress acquires in the consideration and enactment of earlier legislation."[36]

[34] *See* Highway Act of 1987, S. Rep. No. 4 at 11; *Fullilove*, 448 U.S. at 463. Both the SBA and STURAA contain a congressional mandate to increase DBE participation in federal contracting as well as a rebuttable presumption that minority-owned businesses are disadvantaged. 15 U.S.C. 637(d); STURAA, 101 Stat. 144. *See also* 49 C.F.R. Part 23, Subpart D (1994) (implementing STURRA); 13 C.F.R. § 124.603 (1994) (implementing § 8(d)). STURAA defines "socially and economically disadvantaged" by reference to § 8(d) of the SBA.

[35] "After Congress has legislated repeatedly in an area of national concern, its Members gain experience that may reduce the need for fresh hearings or prolonged debate when Congress again considers action in that area." *Fullilove*, 448 U.S. at 503 (Powell, J., concurring).

[36] *Id.* Petitioner contends that the Court should require Congress to make findings of "evidence of a pattern or practice of discrimination in government contracting." Petitioner's Brief at 35. However, Congress is not required to make adjudicatory findings of actual discrimination before enacting remedial legislation. *Fullilove*, 448 U.S. at 502-03 (Powell, J., concurring). "Congress is not an adjudicatory body called upon to resolve specific disputes between

The Court in *Fullilove* carefully reviewed the "abundant" evidence Congress had collected prior to enacting its legislation, and found it sufficiently ample to uphold the MBE provision at issue.[37] Because the MBE provision in *Fullilove* was modeled on existing programs promoting minority-owned businesses under the SBA, *Fullilove*, 448 U.S. at 460, the Court focused its inquiry on the legislative history of the SBA. In the 1978 amendments to the SBA, Congress based its efforts to promote equality of economic opportunity on a lengthy evidentiary record of persistent and widespread discrimination against minority businesses.[38] These amendments were premised on findings

competing adversaries. The creation of national rules for the governance of our society simply does not entail the same concept of recordmaking that is appropriate to a judicial or administrative proceeding." *Id.* at 502; *see also Croson*, 488 U.S. at 489 (Congress "need not make specific findings of discrimination to engage in race-conscious relief") (opinion of O'Connor, J.). Requiring Congress to make such specific factual findings "would mark an unprecedented imposition of adjudicatory procedures upon a coordinate branch of Government. Neither the Constitution nor our democratic tradition warrants such a constraint on the legislative process." *Fullilove*, 448 U.S. at 503 (Powell, J., concurring).

[37] *Id.* at 477-78 (opinion of Burger, C.J.); *id.* at 502-04 (Powell, J., concurring); *id.* at 520 (Marshall, J., concurring). Contrary to petitioner's argument, federal agencies do not have to make additional findings of discrimination. In *Fullilove*, this Court did not require additional findings by state or local grantees in upholding the MBE provision at issue in that case. *Id.* at 478 (opinion of Burger, C.J.). *See also S.J. Groves & Sons Co. v. Fulton County*, 920 F.2d 752, 764 (11th Cir.), *cert. denied*, 500 U.S. 959 (1991).

[38] *See, e.g., Hearings on H.R. 567, H.R. 4960 and H.R. 2379 Before the House Subcomm. on Minority Enterprise and General Oversight of the Comm. on Small Business*, 95th Cong., 1st Sess. (1977) [hereinafter 1977 Subcommittee Hearings on H.R. 567]; Minority Enterprise and Allied Problems of Small Business, H.R. Rep. 468, 94th Cong., 1st Sess. 2 (1975) ("The effects of past inequities stemming from racial prejudice have not remained in the past. The Congress has recognized the reality that past discriminatory practices have, to some degree, adversely affected our present economic system.").

that such legislation was necessary to remedy the effects of discrimination on the ability of minority businesses to keep "pace with the growth of the national minority population."[39] Congress found that "many individuals are socially and economically disadvantaged as a result of being identified as members of certain [minority] groups."[40]

This same legislative history forms part of the "total contemporary record" of the program at issue here. Since the enactment of the program in *Fullilove*, Congress has continued to acquire significant data through oversight and review of its curative programs.[41] Congress has found that discrimination continues to be a barrier to the growth and development of minority businesses.[42] Indeed, with respect to the highway construction industry, precisely the

[39] 1977 Subcommittee Hearings on H.R. 567, *supra* note 38, at 3.

[40] Amending the Small Business Act and Small Business Investment Act of 1958, H.R. Rep. No. 1714, 95th Cong., 2d Sess. 20 (1978).

[41] *See, e.g., City of Richmond v. J. A. Croson: Impact and Response, Hearing Before the Subcomm. on Urban and Minority-Owned Business Development of the Senate Comm. on Small Business*, 101st Cong., 2d Sess. (1991); Minority Business Development Program Reform Act of 1988, S. Rep. No. 394, 100th Cong., 2d Sess. (1988); *Federal Contracting Opportunities for Minority and Women-Owned Businesses: An Examination of the 8(d) Subcontracting Program, Hearings Before the Senate Comm. on Small Business*, 98th Cong., 1st Sess. (1983); 1977 Subcommittee Hearings on H.R. 567, *supra* note 38.

[42] Highway Act of 1987, S. Rep. No. 4 at 11 ("barriers still remain, preventing minorities and women from successfully competing in the industry"); *The Disadvantaged Business Enterprise Program of the Federal-Aid Highway Act, Hearing Before the Subcomm. on Transportation of the Senate Comm. on Environment and Public Works*, 99th Cong., 1st Sess. 2 (1985) [hereinafter 1985 Subcommittee Hearings on 8(d)] ("There is overwhelming support in Congress to open the door of opportunity to enterprising men and women whose race, ethnic background, physical handicap, or gender may have placed them in an economically disadvantaged position.").

industry at issue here, Congress has found that minority contractors' "present disadvantaged position in the field of highway construction is . . . a direct result of historical exclusion." [43] After considering extensive testimony and evidence, Congress decided that the DBE provision of STURAA was "necessary to remedy the discrimination faced by socially and economically disadvantaged persons attempting to compete in the highway and mass transit construction industry." [44] Congress has made precisely the findings found adequate by the Court in *Fullilove,* and to which the Court deferred in that case.[45]

B. The Program Is An Appropriate Means for Achieving Economic Integration of Minority Businesses

The second part of the *Fullilove* inquiry is whether the program at issue is an appropriate means for achieving Congress' objective. *Id.* at 473. When Congress fashions a program that includes consideration of race as one factor among others, such a program must be narrowly-tailored to address Congress' findings of discrimination. *Id.* at 480. However, as the majority in *Fullilove* noted, Congress has broad discretion under the Enforcement Clauses of the Reconstruction Amendments to choose a suitable mechanism for the redress of racial discrimination.[46] Such mechanisms properly may include prospective action designed to eliminate "barriers to minority firm access to public contracting opportunities." *Id.* at 478.

Congress' obligation to construct a narrowly-tailored program requires certain "critical determinations" to guide

[43] 1985 Subcommittee Hearings on 8(d), *supra* note 42, at 25.

[44] Highway Act of 1987, S. Rep. No. 4 at 11.

[45] *Fullilove*, 448 U.S. at 478 (opinion of Burger, C.J.); *see also id.* at 503 (Powell, J., concurring).

[46] "We are mindful that '[i]n no matter should we pay more deference to the opinion of Congress than in its choice of instrumentalities to perform a function that is within its power.'" *Id.* at 480 (opinion of Burger, C.J.) (citation omitted); *id.* at 510 (Powell, J., concurring); *id.* at 520-21 (Marshall, J., concurring).

implementation and administration of the program. *Id.* at 468. The plurality in *Fullilove* characterized those critical determinations as: "the decision to initiate a limited racial and ethnic preference; the specification of a minimum level for minority business participation; the identification of the minority group members that are to be encompassed by the program; and the provision for an administrative waiver where application of the program is not feasible." *Id.* Congress has made these determinations with regard to the program at issue here.

The challenged program reflects Congress' decisions to initiate a limited and rebuttable consideration of race and ethnicity and to identify the minorities encompassed by the program.[47] In making these decisions, Congress fashioned the rebuttable presumption to be flexible, and thereby neither overinclusive nor underinclusive.[48] Under

[47] STURAA, 101 Stat. 132; 49 C.F.R. Part 23, Subpart D (implementing STURAA); 15 U.S.C. § 637(d); 13 C.F.R. § 124.105-06 (implementing § 8(d) of the SBA).

Congress' selection of varied minority group members to benefit from the presumption is a valid exercise of its enforcement powers under the Reconstruction Amendments. Although Congress initially exercised its enforcement powers primarily for the benefit of African-Americans, the Amendments and their Enforcement Clauses contain a general grant of authority to aid all minorities. This Court has noted that although the Thirteenth, Fourteenth and Fifteenth Amendments were "addressed to the grievances of the negro race, and were designed to remedy them . . . '[w]e do not say that no one else but the negro can share in this protection. Both the language and spirit of these Articles are to have their fair and just weight in any question of construction . . . [and] that protection will apply, though the party interested may not be of African descent.'" *United States v. Wong Kim Ark*, 169 U.S. 649, 677 (1898) (quoting *Slaughter-House Cases*, 83 U.S. 36, 72 (1872)).

[48] In this respect, the rebuttable presumption that is one feature of this program is comparable to the 1968 program developed by the Small Business Administration which Justice Stevens cited with approval in *Fullilove*. *See Fullilove*, 448 U.S. at 535 n.6 (Stevens, J., dissenting). In the 1968 program, like the program here at issue, "the class of socially or economically disadvantaged persons neither included all persons in the racial class nor excluded

the implementing regulations for STURAA, nonminorities may qualify as DBEs by demonstrating that they have suffered from social and economic disadvantage.[49] In addition, these regulations establish a mechanism to revoke a DBE's certification if it is found no longer to qualify as disadvantaged.[50] Because this mechanism allows the presumption to be rebutted, it functions as a waiver of the presumption in cases where its application would be unreasonable. This procedure, an integral part of the program that Congress has reviewed on a regular basis, is designed to ensure that only disadvantaged minorities will benefit from the presumption.

Congress also specified a minimum level of minority business participation, another factor the plurality cited as critical in *Fullilove*. *Id.* at 468. In the SBA, Congress set a minimum goal for federal agencies of five percent for the use of DBEs in federal procurement, and required federal agencies to seek the "maximum practicable opportunity" for DBE participation in their procurement contracting.[51] Under STURAA, Congress set a minimum goal of ten percent for DBE participation in Department of Transportation procurement contracting.[52] Through the SBA and STURAA, Congress set thresholds to guide

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all non-members of the racial class. Race was used as no more than a factor in identifying the class of the disadvantaged." *Id.*

[49] 49 C.F.R. Part 23, Subpart D, § 23.62 and Appendix A. The regulation lists disabled Vietnam veterans, Appalachian white males and Hasidic Jews as examples of possibly disadvantaged individuals, to be determined on a case-by-case basis. *Id.*

[50] 49 C.F.R. Part 23, Subpart D, § 23.69. Similarly, § 8(d) of the SBA provides a procedure to challenge a DBE's certification. *See* 13 C.F.R. § 124.603-08.

[51] 15 U.S.C. § 644(g)(1).

[52] 101 Stat. 145 § 106(c)(1). In enacting STURAA, Congress stated that "[s]ome states may wish to establish a DBE goal which exceeds the minimum goal set by this section, and they are permitted to do so." Surface Transportation and Uniform Relocation Assistance Act of 1987, H.R. Conf. Rep. 27, 100th Cong., 1st Sess. 148 (1987).

agencies in the implementation of federal contracting programs. At the same time, Congress has allowed agencies to retain flexibility in setting reasonable goals for their individual agencies.[53]

In addition to setting minimum goals for utilization of DBEs, Congress gave federal agencies a specific mandate to use incentives to increase DBE participation in federal contracting:

> Agencies have the authority to include incentive clauses in government contracts to reward significant efforts on the part of the prime contractor to meet and exceed subcontracting goals. According to the information available to the Committee, however, such clauses are used rarely by most agencies, or not at all. This fact is further evidence that attempts to increase subcontracting goals for small and small disadvantaged business participation are feeble at best.[54]

Congress also endorsed incentive measures to increase DBE subcontracting under the § 8(d) program of the SBA.[55] To that end, Congress has stated:

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[53] Agencies are appropriate entities to carry out legislative directives under congressional supervision. Indeed, this Court has recognized that agencies administering a program pursuant to a federal act should be given great deference in their interpretation of that act. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984). "'The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.'" *Id.* at 843 (quoting *Morton v. Ruiz*, 415 U.S. 199, 231 (1974) (ellipsis in original)). In such a case, the agency acts as an agent of Congress. *Cf. Milwaukee County Pavers Ass'n*, 922 F.2d at 424 (state administering federal program acting as agent of federal government "is no more subject to being enjoined on equal protection grounds than the federal civil servants who drafted the regulations.").

[54] Capital Ownership Development Reform Act of 1987, H.R. Rep. No. 460, 100th Cong., 1st Sess. 38 (1987).

[55] Congress noted that in 1986, out of $61.9 billion subcontracted out by government prime contractors subject to § 8(d), only 1.6%

> [E]very Federal agency, in order to encourage subcontracting opportunities for small business concerns and small business concerns owned and controlled by the socially and economically disadvantaged individuals . . . is hereby authorized to provide such incentives as such Federal agency may deem appropriate in order to encourage such subcontracting opportunities as may be commensurate with the efficient and economical performance of the contract.[56]

The challenged program was developed by a division of the Department of Transportation in direct response to Congress' mandate for DBE participation under the SBA.[57]

Congress has repeatedly reviewed and approved programs implemented pursuant to its directive in the SBA.[58] Indeed, Congress maintains substantial oversight

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was subcontracted to DBEs. Congress found "that these percentages do not reflect maximum practicable participation nor do they constitute an acceptable level of achievement." H.R. Rep. No. 460 at 37.

[56] 15 U.S.C. § 637(d)(4)(E).

[57] The Department of Transportation establishes annual goals in consultation with the Small Business Administration. 15 U.S.C. § 644(g)(2). The Department apportions part of its goal to the Federal Highway Administration, who then apportions part of its goal to the FLHP. FLHP apportions this goal between its three regional offices; CFLHD, Eastern Federal Lands Highway Division, and Western Federal Lands Highway Division.

Petitioner misunderstands this structure, arguing that because Congress set the level for small disadvantaged business participation at 5%, 15 U.S.C. § 644(g)(1), CFLHD cannot set a goal of 12-15%. Petitioner's Brief at 47 n.41. CFLHD's target of 12-15% represents its efforts to meet its *apportioned* goal of FLHP's overall goal. Moreover, under STURAA, Congress set a minimum goal of 10% for DBE participation in federal highway contracting. In any case, CFLHD's goals are inapplicable to this case. Petitioner challenges only the SCC program, in which agency goals are irrelevant—if no prime contractor sought to take advantage of the SCC program, there would be no consequence.

[58] The SBA requires agencies to be accountable to Congress for programs implemented under the SBA. For instance, the SBA

over the administration of minority and small disadvantaged business assistance programs.[59] The continual communication between Congress and federal agencies acting under the SBA ensures that the administration of this federal program complies with congressional objectives.

CONCLUSION

For the reasons stated herein, the decision of the court of appeals should be affirmed.

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requires the Small Business Administration to report to the Committee on Small Business of the Senate and the Committee on Small Business of the House of Representatives on the extent of achievement by agencies (relative to their established goals) in federal contracting programs. 15 U.S.C. § 644(h). To that end, agencies are required to submit their fiscal year accomplishments annually. Section 8(d)(11) of the SBA also requires each year a report of subcontracting plans approved by federal agencies but disapproved by the Small Business Administration for failure to provide maximum practicable opportunities for DBEs. 15 U.S.C. § 637(d)(11).

[59] *See, e.g., GAO Report to Congressional Committees*, "Highway Contracting" (Aug. 1994); *GAO Report to the Chairman, Committee on Small Business, House of Representatives*, "Small Business" (Sept. 1993); *Federal Contracting Opportunities for Minority and Women-Owned Businesses: An Examination of the 8(d) Subcontracting Program, Hearings Before the Comm. on Small Business*, 98th Cong., 1st Sess. (1983).

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ADARAND CONSTRUCTORS, INC.,
Petitioner,

v.

FEDERICO PENA, SECRETARY OF THE DEPARTMENT OF TRANSPORTATION, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF *AMICUS CURIAE* OF THE MINORITY MEDIA AND TELECOMMUNICATIONS COUNCIL, THE LEAGUE OF UNITED LATIN AMERICAN CITIZENS, THE OFFICE OF COMMUNICATION OF THE UNITED CHURCH OF CHRIST, THE NATIONAL HISPANIC MEDIA COALITION, THE COMMUNICATIONS TASK FORCE, THE NATIONAL ASSOCIATION OF BLACK OWNED BROADCASTERS, THE AMERICAN HISPANIC OWNED RADIO ASSOCIATION, AND THE EMERGING TELECOMMUNICATIONS ENTREPRENEURS ASSOCIATION, IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE

Each of the eight *amici* is a national, nonprofit organization actively participating on behalf of minority consumer or business interests in proceedings before the Federal Communications Commission ("FCC").

The Minority Media and Telecommunications Council ("MMTC"), formed in 1986, is an association of approximately one hundred lawyers, engineers and scholars who provide *pro bono* support to civil rights organizations in policy and rulemaking matters before the FCC. MMTC promotes FCC rules and private industry initiatives aimed at increasing opportunities for minorities to own media and telecommunications facilities.

The League of United Latin American Citizens ("LULAC"), the nation's largest Hispanic organization, is concerned with advancing the civil rights and promoting the educational, economic and social well being of Hispanic Americans in the United States. Founded in 1929, LULAC has approximately 33,000 dues-paying members. Several of its local councils and state associations have been active since 1990 in challenges to the FCC license renewal applications of broadcasters who appear to be violating the FCC's broadcast equal employment opportunity rule, 47 C.F.R. § 73.2080 (1993) (the "EEO Rule").

The Office of Communication of the United Church of Christ ("OC/UCC"), founded in 1965, is an instrumentality of the United Church of Christ, a Protestant denomination of approximately 1.6 million members nationwide. OC/UCC was the first program of national scope aimed at promoting racial diversity in the mass media. Its pioneering work in integrating southern television stations led to the landmark ruling affirming the standing of listeners and viewers to participate in broadcast licensing proceedings. *Office of Communication of the United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966). OC/UCC played an

instrumental role in developing the EEO Rule. It has participated in dozens of FCC proceedings over the past three decades as an advocate for minorities in the mass media and in telecommunications.

The National Hispanic Media Coalition ("NHMC"), founded in 1986, is an association of two dozen constituent organizations representing all facets of Hispanic American business, consumer, educational and cultural life. NHMC strives to stimulate employment and ownership opportunities for Hispanics in all mass media.

The Communications Task Force ("CTF"), founded in 1986, is an association primarily composed of African American lawyers and media professionals. CTF sponsors public policy forums aimed at expanding the public dialogue over minority opportunity in the media and telecommunications.

The National Association of Black Owned Broadcasters ("NABOB"), founded in 1976, is the trade association of African Americans who own radio and television stations. Virtually all of the approximately 200 African American owned broadcast stations, are affiliated with NABOB. NABOB conducts management training conferences for its members, encourages advertising and financial investments in African American owned stations, and seeks to protect the interests of African American broadcast companies.

The American Hispanic Owned Radio Association ("AHORA") was founded in 1991 to promote business opportunities for Hispanic American broadcasters. AHORA seeks to increase the number of Hispanic Americans in the broadcasting industry, promote the

interests of the Hispanic community of the United States, and protect the overall interests of the Hispanic American broadcasting industry. Virtually all of the approximately 100 Hispanic owned radio stations are affiliated with AHORA.

The Emerging Telecommunications Entrepreneurs Association ("ETEA"), founded in 1994, is the association of minority entrepreneurs who have won permits to construct FCC licensed facilities in the Interactive Video and Data Service (IVDS). ETEA seeks to develop economic and marketing support networks among minority IVDS operators, as well as encourage the FCC to provide economic opportunities for minority entrepreneurs in the interactive video services market.

Each of the *amici* is intimately involved in promoting congressionally mandated FCC policies which are designed to promote economic opportunity, competition and diversity of viewpoints. The standard for equal protection review of these programs is potentially at issue in this case. Thus, each of the *amici* is vitally interested in the Court's reaffirmation of its holding, in *Metro Broadcasting, Inc. v. FCC*,[1] that wide deference should be afforded Congress when it mandates race conscious policies designed to promote diversity.[2]

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1 497 U.S. 547 (1990).

2 This brief is filed pursuant to S. Ct. Rule 37.3 with the consent of the parties. The consent letters have been filed with the Clerk.

SUMMARY OF ARGUMENT

The Court should leave undisturbed *Metro's* holding that intermediate scrutiny applies to judicial review of congressionally mandated, narrowly tailored, race conscious programs designed to promote diversity of media ownership. The Court should also reaffirm that the degree of deference afforded to an administrative agency which faithfully implements a congressional mandate is the same as the degree of deference afforded to Congress.

ARGUMENT

I. CONGRESS HAS BROAD DISCRETION TO CONSIDER RACE AS ONE OF THE FACTORS PROMOTING THE FIRST AMENDMENT GOAL OF DIVERSITY OF VIEWPOINTS

Petitioner apparently now concedes that five Justices in *Metro* agreed that intermediate scrutiny is the proper standard of review for programs which promote First Amendment values.[3] However, one

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3 *See* Petitioner's Brief at 29-30; *compare* Petition for Writ of Certiorari of Adarand Constructors, Inc. at 12-13 (suggesting that Justice Stevens did not endorse this aspect of *Metro* because his concurring opinion in *Metro* "demands that the reasons for racial classifications be 'clearly identified and unquestionably legitimate'", *quoting Metro*, 497 U.S. at 601 (opinion of Stevens, J.)). *See also* Brief *Amicus Curiae* of the Associated General Contractors of America, Inc. in Support of Petitioner at 8-9 (recognizing that *Metro* applied intermediate scrutiny).

amicus argues that *Metro* should be overruled because, *inter alia*, "it was decided only recently and is not the type of decision upon which ordinary people have placed reliance" and "there is reason to believe that some justices [sic] in the *Metro Broadcasting* majority might reconsider their positions in light of developing demographic and political trends."[4] If this Court intends to reconsider *Metro*, the following is respectfully offered in its defense.

In *Fullilove v. Klutznick*,[5] this Court correctly found that Congress had articulated a substantial governmental interest in redressing past discrimination.[6] The *Fullilove* Court directed that a standard approximating "intermediate scrutiny" should be applied in reviewing congressionally mandated, race conscious remedial programs for equal protection purposes.[7]

Metro is a sound example of the principle that "remedy for past wrong is not the exclusive basis upon which racial classification may be justified."[8] In *Metro*,

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4 Brief *Amicus Curiae* of the Federalist Society, Ohio State University College of Law Chapter at 9, 16. *Amici* are among the "ordinary people" who have "placed reliance" on *Metro*.

5 448 U.S. 448 (1980).

6 *Id.* at 473.

7 *Id.* at 490.

8 *O'Donnell Construction Company v. District of Columbia*, 963 F.2d 420, 429 (D.C. Cir. 1992) (concurring statement of Ruth Bader Ginsburg, J.).

the Court determined that the FCC's congressionally mandated minority ownership policies serve the important government interest in promoting diversity of viewpoints,[9] thereby justifying the application of an intermediate level of scrutiny similar to that authorized in *Fullilove*.

Metro's holding was respectful of the paramount governmental interest in promoting robust public discourse in a multicultural, democratic society. Viewpoint diversity is an important First Amendment goal because social and political consensus will emerge from the clash of diverse and often conflicting ideas and beliefs. Last Term, in *Turner Broadcasting System, Inc. v. FCC*,[10] this Court reaffirmed that "assuring that the public has access to a multiplicity of information sources is a governmental purpose of the highest order, for it promotes values central to the First Amendment."[11]

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9 *Metro*, 497 U.S. at 567-68.

10 114 S. Ct. 2445 (1994).

11 *Turner*, 114 S. Ct. at 2470.

In the electronic mass media, diversity is enhanced by governmental efforts to expand the public's access to the media in order to increase the variety of ideas and beliefs disseminated. In this way, the public interest is served because the public is better informed. *Associated Press v. U.S.*, 326 U.S. 1, 20 (1945).

Historically, ownership has been viewed as a primary determinant of program diversity.[12] Thus, a well accepted means of enhancing viewpoint diversity has been the development of structural, content-neutral regulations diversifying media ownership. *FCC v. NCCB*, 436 U.S. 775, 795 (1978).

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[12] *Metro*, 497 U.S. at 570-71. The Communications Act is premised on the vesting of the right to speak (creation, selection and editing of content) in the owner of the FCC-licensed facilities. *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 596 (1981). Congress and the FCC have both found that minority interests and viewpoints are inadequately represented in the broadcast media. *Metro*, 497 U.S. at 588-592. That is why the FCC has implemented policies designed to assist minorities in owning broadcast stations. *Statement of Policy on Minority Ownership of Broadcast Facilities*, 68 FCC2d 979, 980 (1978).

The *Metro* Court concluded that the FCC's minority ownership policies are substantially related to the achievement of the government's diversity goals.[13] The *Metro* Court deferred to Congress' finding that that the government's substantial interest in promoting viewpoint diversity is enhanced by the inclusion of previously underrepresented minorities in the ownership of the electronic media. The Court concluded that "the interest in enhancing broadcast diversity is, at the very least, an important governmental objective . . . ."[14]

Congress' mandate for the FCC's minority ownership policies was grounded by an empirical nexus between the race of the owner and the range of viewpoints presented[15] and was not the product of impermissible stereotyping of minority broadcasters or

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[13] *Metro*, 497 U.S. at 569.

[14] *Id.* at 567. *Cf. Wygant v. Jackson Board of Education*, 476 U.S. 267, 288 n. * (1986) (opinion of O'Connor, J.) ("[t]he goal of providing 'role models' . . . should not be confused with the very different goal of promoting racial diversity among the faculty.").

[15] *Metro*, 497 U.S. at 579-82 (citing research findings). *Compare Lamprecht v. FCC*, 958 F.2d 382, 393 (D.C. Cir. 1992) (Congress lacked empirical support for a finding that female ownership interests of broadcast facilities is related to the presentation of female viewpoints).

media consumers.[16] Moreover, the policies are content-neutral.[17]

This Court should not require strict scrutiny in evaluating narrowly tailored federal programs such as those in *Fullilove* or *Metro*, or the program under consideration in the instant case. No party or *amicus* has identified any events, occurring since *Metro* was decided, which would compel or even support a decision overruling *Metro*. Therefore, *Metro* should remain undisturbed.

II. AN ADMINISTRATIVE AGENCY DECISION WHICH FAITHFULLY IMPLEMENTS A CONGRESSIONAL MANDATE SHOULD BE AFFORDED THE SAME DEFERENCE AS THAT AFFORDED THE CONGRESSIONAL MANDATE

Petitioner argues that a federal agency's action should only be afforded the lesser degree of deference given the action of a state or local government in

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16 *Metro*, 497 U.S. at 579.

17 Content-neutral regulations "do not require or prohibit the carriage of particular ideas or points of view. They do not penalize [speakers] because of the content of their programming. They do not compel [speakers] to affirm points of view with which they disagree. They do not produce any net decrease in the amount of available speech. And they leave [speakers] free to carry whatever programming they wish on all channels not subject to [the regulations]." *Turner*, 114 S. Ct. at 2462. This definition also perfectly fits the policies approved in *Metro*.

City of Richmond v. J.A. Croson Co.[18] rather than the greater degree of deference afforded the action of Congress in *Fullilove* or *Metro*. This argument overlooks the important distinctions made by this Court in *Croson* between federal and state remedial power, and reflects a misunderstanding of the way in which federal agencies function.

Distinguishing between the Court's decisions in *Fullilove* and *Croson*, Justice O'Connor explained "that Congress, unlike any State or political subdivision, has a specific constitutional mandate to enforce the dictates of the Fourteenth Amendment."[19] The level of deference afforded Congress may also stem from "an amalgam of its [other] specifically delegated powers."[20] These powers include the authority to "provide for the . . . general Welfare" pursuant to Congress' spending power, U.S. Const., art. I, § 8, cl. 1; to take necessary and proper action to protect against inequities that have an effect on interstate commerce under the Commerce Clause, U.S. Const., art. I, § 8, cl. 3; and "'to enforce, by appropriate legislation,' the equal protection guarantees of the Fourteenth Amendment."[21]

These constitutionally delegated powers extend to federal agencies. Petitioner, however, would have this

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18 488 U.S. 469 (1989).

19 *Croson*, 488 U.S. at 490.

20 *Fullilove*, 448 U.S. at 473.

21 *Fullilove*, 448 U.S. at 474-76.

Court treat federal agency actions implementing congressional directives like state or local actions executing state or local goals.

Petitioner's argument fails to recognize the close relationship between Congress and administrative agencies. As this Court has noted, "[i]n our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives." *Mistretta v. U.S.*, 488 U.S. 361, 371-372 (1989).

Agency decisions implementing congressional mandates that implicate but do not run afoul of the Fourteenth Amendment should be construed as any other agency decision should: as part of Congress' plan to achieve Congress' goals.[22]

Systematic safeguards assure that agencies interpretations, statutory administration, and decisions implement congressional goals. Congress' oversight of agency actions is expansive, and begins with Congress' power to amend or repeal a statute if it finds that an agency's implementation of the statute is unsatisfactory. Another "common form of congressional control over regulatory agencies is for the appropriations committees to incorporate policy directives and

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[22] In *Fullilove*, this Court recognized that courts should afford "'great weight to the decisions of Congress' even . . . when a congressional program raises equal protection concerns." *Fullilove*, 448 U.S. at 472 (*quoting Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 102 (1973) (Part I, Burger, J.) (citations omitted).

restrictions in the official reports accompanying appropriations bills."[23] Congress also controls agencies' execution of the laws through hearings,[24] committee investigations, studies by the General Accounting Office, informal contacts between members of Congress and agency officials,[25] and nonstatutory controls.[26]

Congress frequently passes legislation that nullifies initiatives taken by regulatory agencies."[27] In the context of the Federal Communications Commission, for

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[23] Harry Shooshan and Erwin Krasnow, *Congress and the Federal Communications Commission: The Continuing Contest for Power*, 9 Hastings Comm. & Ent. L.J. 619, 626 (1987).

[24] Louis Fisher, *Micromanangement by Congress: Reality and Mythology*, in *Foundations of Administrative Law* 248, 251 (1994). For example, Congress held hearings aimed at insuring that the FCC would act more decisively to facilitate the entry of new programmers into the cable television industry, so as to increase the number of media voices available to consumers. *See* Senate Committee on Commerce, Science, and Transportation, S. Rep. No. 102-92, 102d Cong., 1st Sess. (1991). These hearings were instrumental in the development of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[25] *See* Steven G. Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin. L. Rev. 363, 368 (1986) ("Breyer") (an agency's "staff, in close contact with relevant legislators and staffs, likely understands current congressional views . . . .").

[26] Fisher, *supra* n. 24, at 251.

[27] Shooshan and Krasnow, *supra* n. 23, at 621.

example, "Congress has increasingly resorted to statutory moratoriums, as well as periodic authorizations and riders to appropriations bills, to block or reverse an unusually large number of major FCC decisions."[28] Further, any agency action interpreting a silent or ambiguous issue in a congressional enactment must be "appropriately limited in extent and duration and subject to reassessment and reevaluation by the Congress."[29]

Metro illustrates the close relationship between Congress and agencies which affords agencies congressional deference. Congress' appropriations

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[28] Shooshan and Krasnow, *supra* n. 23, at 619-620. Another example of using legislation to preempt unwanted statutory interpretation was Congress' passage of legislation in 1974 "that barred the Department of Transportation from proceeding with its proposal to require an ignition interlock system." *Id.* at 621 n. 8.

[29] *Metro*, 497 U.S. at 594 (*quoting Fullilove*, 448 U.S. at 489). *See* Breyer, *supra* n. 25, at 368 ("Congress' reenactment of the statute, in the face of an agency interpretation, is also some evidence that the agency's interpretation is correct; or at least it suggests that the agency's interpretation does not radically violate current congressional expectations . . . .") (*quoting NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 275 (1974).

decisions,[30] hearings,[31] and monitoring mechanisms[32] regarding the FCC's use of the minority preference system comprised a system of oversight sufficient to assure that the FCC implemented congressional goals. The Court recognized that Congress would "be able to further tailor the program based on [the] information" received from congressional monitoring mechanisms and that Congress "may eliminate the preferences when appropriate."[33] This Court did not make a distinction between the FCC implementation of the minority preference system and the congressional directive that mandated the system because Congress determined

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[30] This Court noted that congressional "appropriations legislation expressed its unqualified support for the minority ownership policies and instructed the Commission in no uncertain terms that in Congress' view there was no need to study the topic" of reversing the minority ownership policies for that year. *Metro*, 497 U.S. at 577 n. 29.

[31] "Congress has continued to hold hearings on the subject of minority ownership." *Metro*, 497 U.S. at 594.

[32] "Congress instructed the Commission to 'report annually on the effect of the preference system and whether it is serving the purposes intended.'" *Metro*, 497 U.S. at 595. Further, the Congressional Research Service prepared a report regarding minority broadcast ownership to inform the Senate of issues involving the minority ownership policies. *Metro*, 497 U.S. at 578.

[33] *Id.* at 595. As Mr. Justice Frankfurter has pointed out, "Congress which creates and sustains these agencies must be trusted to correct whatever defects experience may reveal." *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 146 (1940).

that the FCC's interpretation bore "the imprimatur of longstanding Congressional support and direction."[34] This Court decided that it "must give great weight" to Congress' and the FCC's "*joint determination*" of the means necessary to promote broadcast diversity.[35]

Failure to afford the same degree of deference to agencies permissibly implementing congressional directives would contravene the policies underlying *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[36] For a unanimous Court in *Chevron*, Justice Stevens explained that "if a statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is

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34 *Metro*, 497 U.S. at 600.

35 *Id.* at 579 (emphasis added).

36 467 U.S. 837 (1984).

based on a permissible consruction of the statute."[37] *Chevron* clarified that agencies may interpret a broad congressional delegation to give a statutory directive substantive meaning.

This Court has faced numerous situations where an agency's interpretation of an ambiguous phrase added

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37 *Id.* at 843. *See also Sullivan v. Everhart*, 494 U.S. 83, 89 (1989) (Scalia, J.); *id.* at 103 (Stevens J., dissenting). To be "permissible" within the meaning of *Chevron*, the agency's interpretation of a statute is "rational and consistent with the statute", *NLRB v. Food and Commercial Workers*, 484 U.S. 112, 123 (1987), and "not in conflict with the plain language of the statute", *K Mart Corp. v. Cartier, Inc.*, 486 U.S 281, 292 (1988). "The word 'permissible' [may be read to be] general enough to embody the range of relevant factors." Breyer, *supra* n. 26, at 373. The Administrative Procedure Act, 5 U.S.C. § 706 (1976), provides that "the reviewing court [is to] decide all relevant *questions of law* [and] interpret constitutional and statutory provisions" (emphasis supplied). Thus, the question for the Court to determine in judging permissibility is partially whether "the particular question [is] one that the agency or the court is more likely to answer correctly . . . ." Breyer, *supra* n. 25, at 370. Micromanagement decisions of agency administration are best left to the agency.

Whether an "agency has special expertise to bear" on either a legal or policy question should weigh heavily towards a permissibility ruling." Breyer, *supra* n. 25, at 370 ("courts will defer more when the agency has special expertise that it can bring to bear on the legal question.") An agency such as the FCC, with a high degree of expertise in communications, should be afforded a high degree of deference. Indeed, "[t]he fast moving nature of communications technology, and the loose language of the [Communications Act], provide some basis for believing that Congress intended to allow the FCC a wider latitude than it typically granted to other agencies." *National Association of Regulatory Utility Commissioners v. FCC*, 533 F.2d 601, 618 n. 98 (D.C. Cir. 1976).

substantive meaning to the minimum set by Congress.[38] No differentiation has been made between an agency's permissible interpretation of a statute and the actual congressional enactments because "Congress . . . exercise[s] the primary legislative function, the administrative agency a secondary one."[39]

Thus, any function an administrative agency serves is subordinate to Congress' power.[40] Congress is

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[38] Since 1935, "Congress has delegated agencies vast powers under statutes written in the broadest possible language. The FTC can stop business practices that are 'unfair.' The ICC sets 'reasonable' rates; the FCC simply acts to serve 'public convenience, interest or necessity.'" Stephen G. Breyer, *The Legislative Veto After Chadha*, 72 Geo. L. J. 785, 788 (1984) (footnotes omitted). *See National Broadcasting Co. v. United States*, 319 U.S. 190, 216 (1943) (the FCC has the authority to administer an elaborate radio licensing scheme implementing Congress' directive to promote the "public interest"); *Yakas v. United States*, 321 U.S. 414, 423 (1944) (the Price Administrator has the authority to fix prices in a flexible manner under Congress' directive to establish such maximum price or prices as in his judgment will be generally fair and equitable and will effectuate the purposes of the Emergency Price Control Act); *Mobil Oil Exploration and Producing Southeast, Inc. v. United Distribution Companies*, 498 U.S. 211, 224 (1991) (the Federal Energy Regulatory Commission had the authority to raise the price ceiling for gas under the Natural Gas Policy Act despite the absence of a set maximum price ceiling).

[39] Bernard Schwartz, *Administrative Law 3d ed.* 45 (1991).

[40] "Any power delegated by Congress is necessarily a subordinate power because it is limited by the terms of the delegating statute." Schwartz, *supra* n. 39, at 45.

intimately engaged in controlling the development and implementation of agency goals and programs, and it never relinquishes its control. Failure to afford agencies the same level of deference as that afforded Congress would ignore that connection.

Agency decisions should be reviewed under the same standard as congressional actions because the benefits that accrue from allowing Congress to grant agencies discretion would otherwise be lost.[41] Granting agencies discretion permits flexibility[42] and political

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[41] *FCC v. Schreiber*, 381 U.S. 279, 290 (1965) (judicial deference to agency determinations "is an outgrowth of the congressional determination that administrative agencies and administrators will be familiar with the industries which they regulate and will be in a better position than federal courts or Congress itself to design procedural rules adapted to the pecularities of the industry and the tasks of the agency involved.") *See generally* Breyer, *supra* n. 25, at 368 (one reason courts afford agencies deference is that "the agency knows more about the particular area of law than does the court."). *See also* Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L.J. 511, 514 (1989) (agencies have an "intense familiarity with the history and purposes of the legislation at issue [as well as a] practical knowledge of what will best effectuate those purposes.")

[42] *See Mobil Oil*, 498 U.S. at 224 ("Congress clearly meant to preserve the pricing flexibility" by leaving the ceiling price open). Agency interpretations of ambiguous phrases allow one phrase to "mean a range of things . . . in light of [the agency's] advancing knowledge [and] in light of the changing political pressures [the agency] feels from Congress . . . ." Scalia, *supra* n. 41, at 517 (internal parenthesis omitted). If agencies are not afforded the deference given Congress, they will be limited in their ability to continuously work with Congress to develop statutory aims.

participation[43] in the administrative process. Consequently, to sustain these benefits to the administrative system, deference to Congress should include deference to agencies acting under congressional direction.

If Congress has validly delegated authority to an agency, and the agency has acted within the scope of that authority, then the agency's action should be treated as Congress' action. Agency actions such as those in *Fullilove*, *Metro* and the instant case are entitled to deference because of the close relationships between Congress and the agencies, the congressional oversight ensuring that Congress' goals are implemented and the scope of Congress' delegations not exceeded, and the benefits of maintaining the flexibility inherent in *Chevron*.

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43 "[A]n agency to which Congress has delegated policymaking responsibility may, within the limits of that delegation, properly rely upon the incumbent administration's view of wise policy to inform its judgments. While agencies are not directly accountable to people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices . . . ." *Chevron*, 467 U.S. at 865. Justice Scalia states that political accountablity is "assured through direct political pressures upon the Executive and through the indirect political pressure of congressional oversight." Scalia, *supra* n. 41, at 518.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

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IN THE
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ADARAND CONSTRUCTORS, INC.,
Petitioner,
v.
FEDERICO PEÑA,
Secretary of Transportation, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF OF THE CONGRESSIONAL ASIAN PACIFIC AMERICAN CAUCUS AND THE NATIONAL URBAN LEAGUE AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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BRIEF OF THE CONGRESSIONAL ASIAN PACIFIC AMERICAN CAUCUS AND THE NATIONAL URBAN LEAGUE AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

INTEREST OF AMICI CURIAE

The Congressional Asian Pacific American Caucus ("CAPAC") was established to ensure that legislation passed by the United States Congress, to the greatest extent possible, provides for the full participation of Asian Pacific Americans and reflects the concerns and needs of the Asian Pacific American communities. In addition, CAPAC works with other Members and Caucuses of the Congress to protect and advance civil and Constitutional rights of all Americans.

The National Urban League's ("League") general purposes are, among others, to improve the living and work-

ing conditions of African Americans and other similarly disadvantaged minorities and to foster better race relations. Moreover, the League and its affiliates seek to assist minority-owned businesses by increasing their opportunities within the mainstream of the American economy.

SUMMARY OF ARGUMENT

This case presents yet another question involving race. Unfortunately, the power of reason has not been employed to analyze this sensitive issue. Monuments of the failure to utilize reason are well documented in *Dred Scott v. Sanford*, 60 U.S. (19 Howard) 393 (1857); *Plessy v. Ferguson*, 163 U.S. 537 (1896); *Brown v. Board of Educ.*, 349 U.S. 294 (1955) (*Brown II*); *Hirabayashi* v. *United States*, 320 U.S. 81 (1943) and *Regents of the Univ. of California v. Bakke*, 438 U.S. 265 (1978). In each instance, these pragmatic decisions failed to adequately reflect the simple ideal embodied in *The Declaration of Independence*—"that all men are created equal."[1] The Tenth Circuit's application of this Court's decisions in *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990), and *Fullilove v. Klutznick*, 448 U.S. 448 (1980), not only attempts to finally bring principled reason to bear on such a sensitive issue, but also reflects, as best as possible, reasons that are consistent with the principle of federalism and an adherence to the Constitution's egalitarian ideals.

This Court's application of strict scrutiny to benign racial classifications is premised upon Justice John Marshall Harlan's admonishment that the Constitution is colorblind. *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting). Yet, "[a colorblind Constitution] is a tradition without a past."[2] American history and American jurisprudence

[1] *The Declaration of Independence* para. 2 (U.S. 1776) provides: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness."

[2] William T. Coleman, Jr., *Equality—Not Yet*, N.Y. Times, Jul. 13, 1981, at A15, Col. 2.

do not suggest that the concept of colorblindness is embodied in the Constitution. Indeed, the *Plessy* decision itself, which was the law of the land for fifty-eight (58) years, did not reflect Constitutional colorblindness. The willing adoption, at this point in time, of a colorblind principle reflects what is amiss with Constitutional doctrine addressing race and equal protection methodology. In every instance when the law impacts race relations, the decisions reflect rationale that is not rooted in the *rule of law*,[3] but unfortunately reflect "pragmatic political judgments sensitive to the times."[4] *Bakke*, 438 U.S. at 299 (Powell, J., concurring) (quoting Archibald Cox, *The Role of the Supreme Court in American Government* (1976)). As such, the application of strict scrutiny to benign racial classifications reflects more the emotion of the popular will, than a doctrine influenced by the fidelity to federalism and the *rule of law*.

The concept of strict scrutiny, which was first enunciated by Justice Black in *Korematsu v. United States*, 323 U.S. 214 (1944), was developed as an analytical tool to ferret out the seeds of rank discrimination, discrimination that was motivated by the view that a particular group was inferior, obnoxious, and odious. The doctrinal roots of strict scrutiny can be traced back to Justice Stone's footnote four of the *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938). In that footnote, Justice Stone expressed that classifications based on race require more searching judicial inquiry to protect "discrete and insular minorities." *Id.* Strict

[3] Since the *rule of law* is susceptible to different meanings, we define the *rule of law* as the idea that the law, which reflects values that appeal to the principles embodied in *The Declaration of Independence*, will be applied impartially regardless of the will of the majority, whomever the majority may be.

[4] This Court must remember that "this is a country of law and not of men. Without that fundamental principle, our country could not survive." *National Treasury Employees Union v. Reagan*, 509 F. Supp. 1337, 1342 (D.D.C. 1981).

scrutiny was thereby not intended to be applied to legislation benefitting "discrete and insular minorities" on a national level. *Id.*

Interestingly, *Metro Broadcasting v. F.C.C.*, 497 U.S. 547, and *Fullilove v. Klutznick*, 448 U.S. 448 (1980), which did not apply strict scrutiny to Congressionally mandated racial classifications, implicitly reflected Justices Black's and Stone's understanding, as well as James Madison's view, that minorities need protection from the excesses of popular will. One of the most difficult problems in a democracy is to protect the minority from the excesses of the majority. This was a problem discussed by one of the Founding Fathers, James Madison, in *The Federalist*. In *The Federalist*, James Madison recognized that a national legislature is much better positioned to protect the minority from the excesses of the majority, because Congress is answerable to a large constituency. Indeed, because the statute before this Court has been developed by Congress, the principles of federalism would preclude the application of strict scrutiny to this statute.

Assuming this Court decides that strict scrutiny is the proper standard to apply to Congressionally mandated racial preferences, the *Croson* standard will effectively doom most legislation dealing with such preferences. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). *Croson*, particularly in light of its application by the lower courts, necessitates the use of statistics to demonstrate a compelling governmental interest. Indeed, the level of statistics required to demonstrate a compelling governmental interest is incompatible with the national legislative process. In sum, the present standard of proof required by *Croson* is impractical for Congress.

ARGUMENT

I. FUNDAMENTAL FIFTH AMENDMENT EQUAL PROTECTION PRINCIPLES DEVELOPED BY THIS COURT OVER THE PAST FIFTY YEARS DO NOT COMPEL THAT STRICT SCRUTINY BE USED TO EVALUATE RACIAL PREFERENCES SANCTIONED BY CONGRESS PARTICULARLY WHEN CONGRESS ACTS PURSUANT TO ITS SPECIAL POWERS UNDER SECTION FIVE OF THE FOURTEENTH AMENDMENT

Introduction

In 1901, W.E.B. DuBois wrote in *The Souls of Black Folk* that "the problem of the Twentieth Century is the problem of the color-line." [5] Indeed, his observation was merely a reflection of what has been a problem of this Country from its founding. *See, e.g., Crandall v. State*, 10 Conn. 339 (1834) (holding, prior to *Dred Scott v. Sanford*, that neither Indians nor free Negroes were citizens within meaning of the Constitution). For a considerable number of years, this Court, the lower federal courts, the states, and the national legislature have been forced to reconcile slavery and subservience with the Constitution's egalitarian ideals. The experience has not been a happy one. Representative of this Court's attempt to address this American dilemma are: *Dred Scott v. Sanford*, 60 U.S. (19 Howard) 393 (1857); *Plessy v. Ferguson*, 163 U.S. 537 (1896); *Brown v. Board of Educ.*, 349 U.S. 294 (1955) (*Brown II*); *Hirabayaski v. United States*, 320 U.S. 81 (1943); and *Regents of the Univ. of California v. Bakke*, 438 U.S. 265 (1978). A persistent and nagging theme common to these and other decisions is not only the failure of these decisions to establish Constitutional doctrine that reflect the ideal embodied in Thomas Jefferson's *The Declaration of Independence* that "all men are created equal," [6] but also a lack of adherence to the precept of *blind justice*.

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[5] W.E.B. DuBois, *The Souls of Black Folk*, 5 (1903).

[6] *The Declaration of Independence* para. 2 (U.S. 1776).

The color-line dilemma continues to plague this Court, and is reflected in its numerous plurality decisions. *See, e.g., Regents of the Univ. of California v. Bakke*, 438 U.S. 265 (1978); *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986); and *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990). Unfortunately, the lack of a coherent Constitutional doctrine addressing the color-line problem has allowed the Petitioner and its *amici* to exploit this void before the Court. Out of this confusion, the Tenth Circuit's application of this Court's decisions in *Metro Broadcasting* and *Fullilove* attempts, as best as possible, to finally bring principled reason to bear on such a sensitive issue and to reflect efforts to reach for reasons consistent with the principles of federalism, the *rule of law*, and history.[7]

Strict scrutiny, unlike an intermediate level of scrutiny, when applied to benign race conscious programs enacted by Congress, does not appropriately reflect the Fifth and Fourteenth Amendments, the demands of federalism, and the legacy of racial discrimination. To the contrary, strict scrutiny would compel constant straining of the Constitution, not by applying concrete fundamental principles, but by the corrosive and annoying process of con-

[7] Given this Court's use of history in reasoning in other areas of Constitutional law, this Court should not now feel hesitant to continue that tradition in the equal protection context. *See generally Lucas v. South Carolina Coastal Council*, —— U.S. ——, 112 S. Ct. 2886 (1992) (using history to show, in takings context, that state traditionally did not compensate individuals for property taken for public use); *Edwards v. Aguillard*, 482 U.S. 578, 605 (1987) (stating that history must be taken into account in interpreting First Amendment); *Allegheny County v. Greater Pittsburgh ACLU*, 492 U.S. 573, 646 (1989) (Stevens, J., concurring) pointing to history of subsidiary of national churches). *But see Podberesky v. Kirwan*, No. 93-2527, No. 93-2585, 1994 U.S. App. LEXIS 29943 at *12 (4th Cir. Oct. 27, 1994) (belittling the district court's use of history stating that, "as long as there are people who have access to history books, there will be programs such as this one").

stant review. As a result, the application of strict scrutiny, as an equal protection doctrine evaluating Congressional affirmative action programs, would continue to produce a series of *ad hoc* and inconsistent decisions, which would only exacerbate the race problem.

A. The application of strict scrutiny to Congressionally sanctioned benign racial classifications is premised upon a false postulate that the Constitution is colorblind

The Petitioner and its *amici* argue that existing Constitutional jurisprudence compels the application of strict scrutiny to Congressional programs.[8] Brief of Petitioner at 24-28; Brief of PLF at 6-24; Brief of ALF at 4-11; and Brief of AGCA at 6-27. To reach this conclusion, Petitioner and its *amici* seek to limit the scope of the two cases, *Metro Broadcasting* and *Fullilove*, in which this Court has had the opportunity to address the issue. Brief of Petitioner at 24-28; Brief of PLF at 6-24; Brief of ALF at 4-11; and Brief of AGCA at 6-27. Notwithstanding the Petitioner's and its *amici's* attempt at distinguishing *Metro Broadcasting* and *Fullilove* and importing *Croson* to their aid, their position is without principled reason in law and inconsistent with decisions of this Court. Both have incorrectly advanced that *Croson* settled once and for all the principle that strict scrutiny should be applied to all racial preferences—regardless of whether the burdened individuals belong to a group that has been subject to historic discrimination and regardless of which legislature enacted the program. Brief of Petitioner at 32; Brief of PLF at 13-29; Brief of ALF at 9-12; and Brief of AGCA at 8-16.

[8] Brief of Petitioner Adarand Constructors, Inc. (hereinafter cited as "Brief of Petitioner"); Brief of Atlantic Legal Foundation (hereinafter cited as "Brief of ALF"); Brief of Pacific Legal Foundation (hereafter cited as "Brief of PLF"); and Brief of The Associated General Contractors of America, Inc. (hereinafter cited as "Brief of AGCA").

In a tremendous effort to extricate itself from precedent and principles previously established in Constitutional jurisprudence, nearly twenty years ago, a plurality of this Court incautiously decided that the Constitution is colorblind. *Regents of the Univ. of California v. Bakke*, 438 U.S. 265 (1978). In *Bakke*, Justice Powell, for a plurality, seemed to suggest that, because the Constitution is colorblind, strict scrutiny should apply to all racial classifications whether benign or invidious. *Bakke*, 438 U.S. at 291-300 (Powell, J., concurring). There is no doubt that questions touching upon race present the single most difficult issue confronting the Court. Consequently, the need to advance a colorblind principle of Constitutional law is not only appealing for its structural elegance,[9] but because it appeals to the best of our democratic ideals. Yet, "[a colorblind Constitution] is a tradition without a past." [10]

The application of strict scrutiny to benign racial classifications sanctioned by Congress is predicated upon the postulate that the Constitution is colorblind. This postulate, which was first suggested by Justice John Marshall

[9] "Principled decisions are those that rest on reasons with respect to all the issues in the case, reasons that in their generality and their neutrality transcend any immediate result that is involved." *Compare* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 119 (1959) *with* Arthur Miller and Ronald F. Howell, *The Myth of Neutrality in Constitutional Adjudication*, 27 U. Chi. L. Rev. 661, 676 (1960); Addison Mueller and Murrall O. Schwartz, *The Principle of Neutral Principles*, 7 U.C.L.A. L. Rev. 571 (1960); Jan Deutsch, *Neutrality, Legitimacy, and the Supreme Court: Some Intersections Between Law and Political Science*, 20 Stan. L. Rev. 169 (1968); Charles E. Clark, *A Plea for the Unprincipled Decision*, 49 Va. L. Rev. 660 (1963); G. Edward White, *The Evolution of Reasoned Elaboration Jurisprudential; Criticism and Social Change*, 59 Va. L. Rev. 279 (1973); Gerald Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency In Judicial Review*, 64 Colum. L. Rev. 1 (1964); *and* Benjamin Andrew Zelermyer, *Benjamin N. Cardozo: A Directive Force in Legal Science*, 69 B.U. L. Rev. 213, 219 (1989).

[10] William T. Coleman, Jr., *Equality—Not Yet*, N.Y. Times, Jul. 13, 1981, at A15, Col. 2.

Harlan in his dissent to *Plessy v. Ferguson*, 163 U.S. at 557, is not only contrary to the history of this Country, but is not reflected in the Constitutional jurisprudence by this Court. *See, e.g., Dred Scott v. Sanford*, 60 U.S. (19 Howard) 393 (1857); *Brown v. Board of Educ.*, 349 U.S. 294 (1955) (*Brown II*); *see also* Gunnar Myrdal, *An American Dilemma: The Negro Problem and Modern Democracy* (1944). These cases established Constitutional principles that were consistently influenced by the color-line. *See, e.g., Gong Lum v. Rice*, 275 U.S. 78 (1927) (upholding state authority to exclude child of Chinese ancestry from "white" schools because equal facilities were provided for non-whites). Indeed, it was because of a history of Constitutional interpretation that was influenced by the color-line that Justice Black in *Korematsu v. United States*, 323 U.S. 214 (1944) and Justice Stone in *United States v. Carolene Products Co.*, 304 U.S. 144 (1938), recognized that racial classifications against minorities required judicial scrutiny. Until *Bakke*, and to a certain extent in *Defunis v. Odegaard*, 416 U.S. 312 (1974) (*per curiam*), racial classifications were applied to exclude racial minorities from the full benefits of society. In sum, the reason that racial classifications deserve this Court's most searching scrutiny is because history has amply demonstrated that political majorities will exact a toll on racial minorities.[11] History, however, would not suggest that political majorities would invidiously discriminate against themselves. James L. McAlister, *Comments: A pigment of the Imagination: Looking at Affirmative Action through Justice Scalia's Colorblind Rule*, 77 Marq. L. Rev. 327, 351, 353 n.209, *citing* John Ely, *The Constitutionality of Reverse Discrimination*, 41 U. Chi. L. Rev. 723, 727, 735 (1974).

[11] As James Madison observed, when contemplating how to curb the excesses at the majority for this new country, "[w]e have seen the mere distinction colour made in the most enlightened period of time, a ground of the most oppressive dominion ever exercised by man over man." James Madison, June 6, 1787, *Notes of Debates in the Federal Convention of 1787*, 76-77.

The legacy of racism persists despite the efforts of the law to dictate otherwise. When the Thirteenth, Fourteenth, and Fifteenth Amendments were adopted,[12] they did not, with the blink of an eye, eliminate racism. When *Brown v. Board of Education,* 347 U.S. 483 (1954), reversed the "separate but equal" principles of *Plessy,* this Court did not destroy the notion that African Americans and other insular and discrete minorities were inherently inferior. As Alexis de Tocqueville observed, long before slavery was abolished, "[a] natural prejudice leads a man to scorn anybody who has been his inferior, long after he has become his equal; the real inequality . . . is always followed by an imagined inequality rooted in mores." Alexis de Tocqueville, *Democracy in America* 341 (G. Lawrence trans., J. Mayer ed. 1969); *see also* William T. Coleman, Jr., *A Bicentennial Celebration of the Constitution: The Third Circuit Judicial Conference in Philadelphia: Federalism, The Great Vague Clauses and Judicial Supremacy: Their Constitutional Role in the Liberty of a Free People,* 49 U. Pitt. L. Rev. 699, 709 n.49 (1988) (discussing effects of racism). In other words, inequality and disadvantage do not end simply because this Court declares that the Constitution is colorblind. As the great jurist J. Skelly Wright observed, "to abruptly retreat ot the abstract ground of high principle in face of the reality is to ignore the fact that this nation has irrevocably rejected the strict colorblind theory of government." J. Skelly Wright, *Colorblind Theories and Color-Conscious Remedies,* 47 U. Chi. L. Rev. 213, 220 (1979).

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[12] Justice O'Connor recognized the context in which these amendments were enacted, when she stated that:

> The Civil War Amendments themselves worked a dramatic change in the balance between congressional and state power over matters of race. Speaking of the Thirteenth and Fourteenth Amendments in Ex parte Virginia, 100 U.S. 339, 345, 25 L. Ed. 676 (1880), the Court stated: 'They were intended to be, what they really are, limitations of the powers of the States and enlargement of the Power of Congress.'

City of Richmond v. J.A. Croson Co., 488 U.S. 469, 490 (1989).

This Court's decisions in *Bakke, Fullilove, Wygant, Croson,* and *Metro Broadcasting* all reflect the tension of a genuine attempt to grapple with the race problem honestly and as forthrightly as possible given the convergence of precedent and history while recognizing that "there is little in our jurisprudence to date that will guide us in . . . [the area of affirmative action]." *Id.* at 232. In *Bakke,* a tie between two four-Justice coalitions was broken by Justice Powell who voted to invalidate the minority admissions quota but recognized the use of race conscious programs. *Bakke,* 438 U.S. at 319-20. In *Fullilove,* the Court broke into three groups with three Justices setting the prevailing view by voting to uphold a race conscious program. *Fullilove,* 448 U.S. at 453-92. In *Wygant,* only a plurality could agree on the reason to strike down a race based plan to lay off public school teachers. *Wygant v. Jackson Bd. of Educ.,* 476 U.S. 267, 269-84 (1986). In *Croson,* "one of the most complex scorecards of the history of the Court," [13] was decided only after much division between the Justices. In *Metro Broadcasting,* this Court tried to utilize principled reason when it recognized that strict scrutiny was not the proper standard, but again the Court spoke through a plurality opinion.

Justice Oliver Wendell Holmes observed in his book *The Common Law* that: "the life of the law has not been logic: it has been experience." Oliver W. Holmes, *The Common Law* 1-2 (1881). The application of strict scrutiny to benign racial classifications, particularly when enacted or sanctioned by Congress, does not truly reflect the experience of the law on this issue. The experience of American law has revealed that racial classifications have been used, as recognized by Justice Stone in *Carolene Products Co.,* 304 U.S. at 152 n.4, by political majorities against minorities. As such, the application of strict scrutiny in the context of Congressional affirmative action programs is without historic support.

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[13] Thomas Ross, *The Richmond Narratives,* 68 Tex. L. Rev. 381, 395 (1989).

Indeed, because strict scrutiny was developed under a different set of circumstances, its value as a principle of equal protection doctrine for application to benign racial classification is significantly diminished, particularly at the Congressional level. Harvard Law Professor Wechsler defined a principle as "one that rests on reasons with respect to all the issues in the case, reasons that in their generality and their neutrality transcend any immediate result that is involved." *See* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1, 19 (1959). The corruption of a principle occurs when *ad hoc* and constant defining and redefining of the principle occurs within a relatively short period in history. *Id.* at 21-35; *see also* Charles A. Reich, *Mr. Justice Black and the Living Constitution*, 76 Harv. L. Rev. 673, 737 (1963). Strict scrutiny was developed to protect minorities. *Korematsu v. United States*, 323 U.S. 214 (1944); *United States v. Carolene Products Co.*, 304 U.S. 144 (1938). Conceptually, as a principle, strict scrutiny makes good judicial and political sense. It reflects historical reality, and it reflects ideals that date back from the inception of this Country. *See The Federalist*, Nos. 10, 51 (James Madison) (Sesquicentennial ed. 1937); Robert A. Burt, *The Constitutional Conflict*, 36-47 (1992). Given that strict scrutiny stands on such firm foundation, it proved exceedingly useful in "smok[ing] out" the illegitimate uses of race by political majorities. *Croson*, 488 U.S. at 506. Taken out of this context, however, strict scrutiny loses all value as a neutral principle of general application, particularly as it relates to advancing the idea of a colorblind Constitution.

The application of strict scrutiny as a principle of equal protection to benign racial classifications enacted by Congress can only accomplish three purposes: (i) rob the idea of a colorblind Constitution of its intrinsic value; (ii) rob the application of exacting judicial scrutiny of racial classifications of its meaningful value within the context of addressing the excesses of political majorities; and (iii) perpetuate the lingering legacy of a color conscious Constitution.

B. The demands of federalism preclude the application of strict scrutiny to Congressionally sanctioned benign racial classifications

This Court's rejection of the application of strict scrutiny in *Metro Broadcasting* and *Fullilove* is an expression of the concepts of federalism within the context of the equal protection clause. This expression is further amplified when one considers the *Metro Broadcasting* and *Fullilove* decisions in light of this Court's decisions in *Bakke*, *Wygant*, and *Croson*. The apparent distinction between the latter three cases and the *Metro Broadcasting* and *Fullilove* cases is that this Court has implicitly recognized there must be a stricter equal protection review of state and local action than that of Congress, which can act to remedy past discrimination pursuant to section 5 of the Fourteenth Amendment. *See, e.g., Katzenbach v. Morgan*, 384 U.S. 641 (1966). Justice O'Connor and Justice Powell have expressly recognized this distinction in *Croson* and *Bakke* respectfully. *Croson*, 488 U.S. at 490 ("Congress, unlike any other state or political subdivision, has a specific constitutional mandate to enforce the dictates of the Fourteenth Amendment . . . to define situations which Congress determines threaten principles of equality and to adopt prophylactic rules to deal with those situations"); *Bakke*, 438 U.S. at 302 ("We have previously recognized the special competence of Congress to make findings with respect to the effects of identified past discrimination and its discretionary authority to take appropriate remedial measures").

Directly applicable to the issues before the Court, Justice Scalia, in his concurring opinion in *Croson*, recognized the concept of federalism in an equal protection analysis of benign racial classifications drawn by Congress. In *Croson*, Scalia said that a "sound distinction between federal and state (or local) action based on race rest not only upon . . . [the plain language of the first and fifth sections of the Fourteenth Amendment] but upon social reality and governmental theory." *Croson*,

488 U.S. at 522 (Scalia, J., concurring). Justice Scalia further advanced a view wholly compatible with James Madison's view by stating "that racial discrimination against any group finds a more ready expression at the state and local level rather than at the federal level." *Id.* at 523. This view was clearly articulated by James Madison in *The Federalist*. *The Federalist*, Nos. 10, 51 (James Madison) (Sesquicentennial ed. 1937). At the heart of the Madisonian principle is an understanding that federalism would help avoid one of the central problems of democracy—the prospensity of popular governments to resolve conflicts "not according to the rules of justice and the rights of the minor party, but by the superior force of an interested and overbearing majority." [14] Thus, Madison's grappling with the issue of treatment and protection of the minority by the majority within the context of the democratic process [15] has great meaning for an equal protection analysis.

The judgments of Congress, as opposed to those of a local or a state legislature, are entitled to particular deference, because Congress is the Constitutional equal of this Court. Moreover, as a large and popularly elected body, Congress mirrors the national will—a consideration of importance in a country founded upon the sovereignty of the people. Judicial restraint, therefore, in the review of federal statutes follows naturally from the realization that courts "are not representative bodies. They are not designed to be a good reflex of a democratic society." *Dennis v. United States*, 341 U.S. 494, 525 (1951) (Frankfurter, J., concurring); *see* Learned Hand, *The Bill of Rights* 11-18 (1958); Alexander M. Bickel, *The Least Dangerous Branch* (1962).

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[14] *The Federalist*, No. 10, at 54 (James Madison) (Sesquicentennial ed. 1937).

[15] *The Federalist*, Nos. 10, 51 (James Madison) (Sesquicentennial ed. 1937).

In reviewing civil rights legislation, this Court has often recognized "the special competence of Congress to make findings with respect to the effects of identified past discrimination and its discretionary authority to take appropriate remedial measures." *Bakke*, 438 U.S. at 301 n.41 (Powell, J.); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 440 (1968); *Katzenbach v. Morgan*, 384 U.S. at 648-653; *South Carolina v. Katzenbach*, 383 U.S. 301, 326-27 (1966); *Katzenbach v. McClung*, 379 U.S. 294, 305 (1964). This Court is to give judicial deference to the edicts of the political democracy absent some justifiable reason to ignore the decisions of the populace. The Court's basis for stepping into the political arena to make adjustments has been where the political process was perverted and used to the detriment of a "discrete and insular" minority whom was unable to protect itself from the tyranny of the majority. *Carolene Products Co.*, 304 U.S. at 152 n.4.

The language of the Fourteenth Amendment clearly limited the authority of the state and not Congress—an implicit recognition of the Madisonian concept of the democratic principles of this Country.[16] U.S. Const. amend. XIV, § I. The basis for failing to limit Congress' authority seems quite reasonable, since the federal government, which is answerable to a large constituency, exerts a broader spectrum of power than a state, and thus may be immune to more discrete and parochial interests and concerns.[17] This Court has recognized that Congressionally mandated actions deserve greater deference because such acts are subject to the equal pro-

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[16] "Madison, by arguing that a large republic would best protect minorities, rejected requirements of homogeneity, egalitarianism, and smallness." Notes, *A Madisonian Interpretation of the Equal Protection Doctrine*, 91 Yale L.J. 1403, 1405 n.5 (1982) (citations omitted).

[17] *See generally The Federalist*, No. 10, at 60 (James Madison) (Sesquicentennial ed. 1937).

tection component of the due process clause of the Fifth Amendment. *See Hampton v. Mow Sun Wong*, 426 U.S. 88, 100 (1976). In fact, this Court has required that the Congressional goal underlying race conscious remedies "must be considered against the background of ongoing efforts directed toward deliverance of the century-old promise of equality of economic opportunity." *Fullilove*, 448 U.S. at 463.

As espoused by Justice Holmes, this Court has approached Congressionally mandated acts under the guise of the "gravest and most delicate duty that this Court is called on to perform." *Fullilove*, 448 U.S. at 472, *citing Blodgett v. Holden*, 275 U.S. 142, 148, *modified by* 276 U.S. 594 (1927). Following that edict, this Court stated "we are bound to approach our task with appropriate deference to the Congress, a co-equal branch charged by the Constitution with the power to 'provide for the . . . general welfare of the United States.' . . . [W]e accorded . . . 'great weight to the decisions of Congress' even though the legislation implicated fundamental constitutional rights. . . . The rule is not different when a congressional program raises equal protection concerns." *Fullilove*, 448 U.S. at 472 (citations omitted).

The application of strict scrutiny to state and local legislation is consistent with the Madisonian concept that state and locally sponsored race conscious programs may require some heightened scrutiny. *Regents of the Univ. of California v. Bakke*, 438 U.S. 265 (1978); *Fullilove v. Klutznick*, 448 U.S. 448 (1980). This understanding clearly reflects the Court's divergent treatment between the two governmental entities. Under section 5 of the Fourteenth Amendment, Congressional acts mandated by the Constitutionally chartered body deserve greater deference because Congress is charged with the enforcement of the equal protection clause as applied to the states.[18] U.S. Const. amend. XIV, § 5.

[18] Section 5 of the Fourteenth Amendment states: "The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article." U.S. Const. amend. XIV, § 5.

II. IN ANY EVENT, THE APPLICATION OF STRICT SCRUTINY AS DEVELOPED BY THIS COURT UNDER *CITY OF RICHMOND v. J.A. CROSON* IS IMPRACTICAL FOR A NATIONAL LEGISLATIVE BODY CONFRONTED WITH THE NEED TO UTILIZE BENIGN RACIAL CLASSIFICATIONS

A. Statistics of the type demanded by *Croson* are incapable of comprehending discrimination on the scale contemplated by national racial preferences

As documented by scholars, history is clear - discrimination against racial minorities in this country has resulted in vast inequalities which remain today. *See* Cornel West, *Race Matters* (1993); Paul M. Sniderman and Thomas Piazza, *The Scar of Race* (1993). Congress' powers through section 5 of the Fourteenth Amendment authorize this body to enact remedial legislation to correct the evils of invidious discrimination for the good of our democratic society. Thus, deference has been accorded to Congress to rectify discrimination.

Affirmative action programs are most often designed "to remedy the present effects of past discrimination." *Wygant*, 476 U.S. at 280 (quoting *Fullilove*, 448 U.S. at 480 (opinion of Burger, C.J.)). Legislatures enacting these programs seek to remedy existing disparities such that they recognize that a system grounded in preventive measures alone cannot overcome the pervasive effects of the history of racism.[19] Robert Allen Sedler, *Beyond*

[19] By implementing affirmative action programs, legislature apparently recognize that "You do not take a person who, for years, has been hobbled by chains and liberate him, bringing him up to the starting line of a race and then say, 'You are free to compete with all the others,' and still justly believe that you have been completely fair." George R. LaUoue and John Sullivan, Esq., *"But For" Discrimination: How Many Minority-Owned Businesses Would There Be?*, 24 Colum. Hum. Rts. L. Rev. 93, 96 (1992-93), *citing* President Lyndon B. Johnson, Commencement Address at Howard University (June 4, 1965), *cited in In the Eyes on the Prize: Civil Rights Reader* 613 (Clayborne Carson et al. eds. 1991).

Bakke: The Constitution and Redressing Social History of Racism (1979) (concluding that "the present system of prevention has not and cannot overcome the persistent efforts of our long and tragic history of racism"). These programs attempt to meet the recognition that, "absent explanation, it is ordinarily expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired."[20] *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 340 n.20 (1977), *cited in Hazelwood School Dist. v. United States*, 433 U.S. 299, 307-08 (1977).

Statistics do not lend themselves to comprehending the breadth of a national affirmative action program. Appreciating the limitations of statistics, particularly at the national level, requires appreciating the scope of the problem facing minority-owned businesses. It has, for some time now, been widely recognized that minority businesses are not an integral part of America's free enterprise system.[21] For example, African-American owned enterprises constitute approximately 3% of all U.S. businesses and 1% of all U.S. revenues. Laura Everson and Carl T. Hall, *How Black Firms are Fairing, Minority Businesses Still Struggling To Get Into Economic Mainstream*, S.F. Chronicle, May 11, 1992, at B1. Indeed, racial discrimination in American commerce was an integral part of the system and is heavily documented. Booker T. Washington and W.E.B. DuBois were early comentators on the issue. Booker T. Washington. *The Negro, and The Labor Unions*, Atlantic Monthly, Jul. 1913, at 756-767; W.E.B.

[20] *Cf. Maryland Troopers Ass'n, Inc. v. Evans*, 993 F.2d 1072 (4th Cir. 1993) (finding that "[i]nferring past discrimination from statistics alone assumes the most dubious of conclusions: that the true measure of racial equality is always to be found in numeric proportionality").

[21] *See, e.g.*, Summary of Activities of the Committee on Small Business, 94th Congress, 2d Sess. 182-83 (1976).

DuBois, *The Economic Future of the Negro* (1906) at 219-42; Sterling D. Spero and Abram Harris, *The Black Workers* (1931); Ray Marshall *The Negro in Organized Labor* (1965); W.E.B. DuBois, *Against Racism: Unpublished Essays, Papers, Addresses 1887-1991* (1983).

One cannot lose sight of the fact that affirmative action programs are designed to mitigate and rectify the discriminatory evils of the past and present in a manner that increases minority participation in the economy of our democratic society. To require nationally mechanistic statistical analyses from Congress is Herculean. Applying *Croson* to the statute at issue would in essence foreclose many Congressionally mandated affirmative action programs. Not only is the task of justification and statistical vertification of discrimination nearly impossible to accomplish, some sources of covert racism and discrimination allude capture by statistics. Indeed, Petitioner and its *amici* have spent a considerable amount of argument demonstrating the inherent problems of refining statistics. Furthermore, it is evident that not all social and economic disparities can be identified as race-neutral. Thus, this Court should recognize the purpose of Congress' remedial acts, as well as the practical limitations of a national legislative body, when considering the application of strict scrutiny.

B. The scope of statistics required by *Croson* are impractical for a national legislative body

The Constitution does not require that a legislature conduct hearings, build a record, and make formal findings when it passes a law. *Perez v. United States*, 402 U.S. 146, 156-57 (1971); *Oregon v. Mitchell*, 400 U.S. 112, 147 (1970) (Douglas, J., concurring in part and dissenting in part); *Katzenbach v. McClung*, 379 U.S. 294, 299 (1964); *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495 (1937); *Bi-Metallic Investment Co. v. State Bd. of Equalization*, 239 U.S. 441 (1915). As Professor Cox has noted, "[t]he Court does not review the suffi-

ciency of the evidence in the record to support congressional action . . . and the practice of relying upon the legislative record when it exists should not be taken to show that such a record is required." Archibald Cox, *The Supreme Court, 1965 Term-Forward: Constitutional Adjudication and the Promotion of Human Rights*, 80 Harv. L. Rev. 91, 105 (1966).

This basic separation of powers principle is embodied in the Constitution's grant to Congress of the power to "determine the Rules of its Proceedings." U.S. Const. art. I, § 5. The courts, far from requiring a detailed legislative history or findings, have "long been committed both to the presumption that facts exist which sustain congressional legislation and also to deference to congressional judgment upon questions of degree and proportion." Cox, *supra* 21, at 107. The relevant cases support this analysis; they uniformly hold that a statute "will not, be set aside if any state of facts reasonably may be conceived to justify it." *McGowan v. Maryland*, 366 U.S. 420, 426 (1961); *James v. Strange*, 407 U.S. 128, 133 (1972).

Croson recognized that Congress is assigned the duty to remedy society-wide discrimination. *Croson*, 488 U.S. at 490; *Coral Constr. Co. v. King County*, 941 F.2d 910, 925 (9th Cir. 1991), *cert. denied*, —— U.S. ——, 112 S. Ct. 875 (1992); *Ellis v. Skinner*, 961 F.2d 912 (10th Cir. 1992), *cert. denied*, —— U.S. ——, 113 S. Ct. 374 (1992), *citing Fullilove*, 448 U.S. at 478. As such, Congress is not required to make the same particularized findings as are the states for every affirmative action statute that it passes. Moreover, Congress is not required to make specific findings of past discrimination where it has an abundant historical basis upon which to ground its legislation. *Ellis v. Skinner*, 961 F.2d 912 (10th Cir. 1992), *citing Fullilove*, 448 U.S. at 478. "After Congress has legislated repeatedly in an area of national concern, its Members gain experience that may reduce the need for fresh hearings or prolonged debate when Congress again considers action in that area." *Fullilove*, 448 U.S. at 503 (Powell, J., concurring). Thus, the "joint

lesson of *Fullilove* and *Croson* is that the federal government can, by virtue of the enforcement clause of the Fourteenth Amendment, engage in affirmative action with a freer hand than states and municipalities can do." *Milwaukee County Pavers Ass'n v. Fielder*, 922 F.2d 419 (7th Cir.), *cert. denied*, 500 U.S. 954 (1991); *Tennessee Asphalt Co. v. Farris*, 942 F.2d 969 (6th Cir. 1991). Accordingly, although the Court may require Congress to demonstrate historical discrimination against minorities in order to justify a program of affirmative action, it is impractical to require Congress to meet the strict requirement of detailed statistics established by *Croson*.

Furthermore, if the Court requires Congress to utilize a *Croson* statistical analysis to justify race conscious legislation, many Congressional programs would never come into being, because of the difficulty and costs involved in completing the requisite studies necessary for a program intended to reduce the effects of discrimination on a national basis. *Cf. Long v. City of Saginaw*, 911 F.2d 1192 (6th Cir. 1990) (finding of unconstitutionality because defining statistical pool as "protective services" is too all encompassing and fails to look at age, education, fitness, and other attributes); *O'Donnell Constr. Co. v. District of Columbia*, 963 F.2d 420 (D.C. Cir. 1992) (concluding state affirmative act unconstitutional); *Coral Constr. Co. v. King County*, 941 F.2d 910 (9th Cir. 1991), *cert. denied*, —— U.S. ——, 112 S. Ct. 875 (1992) (finding county set-aside program unconstitutional); *Podberesky v. Kirwan*, No. 93-2527, No. 93-2585, 1994 U.S. App. Lexis 29943 (4th Cir. Oct. 27, 1994) (finding university's scholarship program unconstitutional); *Hayes v. North State Law Enforcement Officers Ass'n*, 10 F.3d 207 (4th Cir. 1993) (concluding city promotion policy unconstitutional); *United Black Firefighters Ass'n v. City of Akron*, 976 F.2d 999 (6th Cir. 1992) (finding consent decree regarding hiring procedures unconstitutional); *Black Fire Fighters Ass'n of*

Dallas v. City of Dallas, 19 F.3d 992 (5th Cir. 1994) (finding consent decree regarding promotion plan unconstitutional); *Cunico v. Pueblo School Dist. No. 60*, 917 F.2d 431 (10th Cir. 1990) (finding hiring decision unconstitutional).

The statistical burden Petitioner and its *amici* seeks this Court to place on Congress is senseless and insurmountable. Petitioner and its *amici* would require the federal government to map each political subdivision of the United States for every job category imaginable with respect to historical and contemporary discrimination. Brief of Petitioner at 34-41; Brief at ALP at 13-29; Brief of PLF at 24-28. For example, the Pacific Legal Foundation states that:

> Section 5 authority is lacking in this case because neither Colorado nor any political subdivision within Colorado has been shown to have engaged in discrimination in the highway construction industry.

Brief of PLF at 27-28. If Congress is required to act within these constraints, it will be rendered impotent given that the task of Congress to comprehend discrimination on a national scale is daunting, and would result in hundreds of hearings and studies, costing millions of dollars. *See, e.g.*, George R. LaNovu, and John Sullivan, Esq., *"But For" Discrimination How Many Minority-Owned Businesses Would There Be?*, 24 Colum. Hum. Rts. L. Rev. 93, 99 (1992-93) ("By March 1991, 29 state and local jurisdictions had completed some sort of post-*Croson* MBE study at a total cost over $5,491,162. The Minority Business Enterprise Legal Defense and Education Fund, Inc. also reported that another 37 studies were underway at costs totalling over $7,029,929."); Martin Katz, *The Economics of Discrimination: The Three Fallacies of Croson*, 100 Yale L.J. 1032 (1991); James E. Jones, *The Genesis and Present Status of Affirmative Action in Employment: Economic, Legal, and Political Realities*, 70 Iowa L. Rev. 901, 933-39 (1985).

Furthermore, Congress does not function in a manner that lends itself to the multiplicity of tasks required by *Croson*. Congress would need to hire sociologists, statisticians, and other professionals to undertake the statistical analyses necessary to comprehend the impact of discrimination on particular industries on a national level. *See* George R. LaNovu and John Sullivan, Esq., *"But For" Discrimination How Many Minority-Owned Businesses Would There Be?*, 24 Colum. Hum. Rts. L. Rev. 93, 99 (1992-93); Martin Katz, *The Economics of Discrimination: The Three Fallacies of Croson*, 100 Yale L.J. 1032 (1991); James E. Jones, *The Genesis and Present Status of Affirmative Action in Employment: Economic, Legal, and Political Realities*, 70 Iowa L. Rev. 901, 933-39 (1985). Such a standard is not only impractical, but it also inappropriately imposes a unique and undue burden on federal legislation designed to remedy the effects of past discrimination. Given the egalitarian goals associated with such programs along with the greater deference provided to Congress, it defies Constitutional jurisprudence to require affirmative action programs to meet a higher standard of statistical certitude and burden than any other legislation passed by Congress.

In order to uphold affirmative action programs, *Croson* requires that the affected industry be statistically broken down into its smallest segments of trade and profession in order to analyze and decide whether there is discrimination against individuals in all of those positions. *Croson*, 488 U.S. at 501-02; *Hazelwood School Dist.*, 433 U.S. at 308. Importantly, the Small Business Administration's categorizing of U.S. industry—the Standard Industrial Classification ("SIC") codes—encompasses seven pages of single space delineation in the Code of Federal Register of various job categories to be examined. 13 C.F.R. § 121.601. A *Croson* analysis on the federal level would require Congress to investigate the discriminatory practices in each of these job categories for programs promoting economic diversity. Such a requirement is an

impossible task, and ensures that the economy will be unduly dominated by majority-owned established businesses at the expense of minority-owned businesses.

Moreover, to require a mechanistic statistical analysis of Congress as a prerequisite to upholding its legislation is inapposite to the intent of the Fourteenth Amendment. *See Fullilove v. Klutznick*, 488 U.S. 488 (1988); *Metro Broadcasting, Inc.* v. *FCC*, 497 U.S. 547 (1990). The goal of section 502 is to better the economy of this Country by freeing up more resources presently kept down by discrimination, and in the process remedy the effects of discrimination. 15 U.S.C. § 361. By the imposition of major expenses on a national entity attempting to establish such a program, the legislature will most likely conclude that the most cost-effective measure is to simply allow racism to flourish, an intolerable result. Accordingly, the proposal to require Congress to meet the comprehensive use of statistics established by *Croson* should be rejected.

To advance a democratic society, Congress has and must be allowed to continue to ensure that all citizens are integrated into this society politically, socially, and economically. The Fourteenth Amendment provides Congress with such power; thus this Court must not limit Congress' power by imposing the nearly impossible—national studies of discrimination using a *Croson* standard of statistically vertification. Accordingly, it is impractical and against sound reasoning to impose a *Croson* statistical requirement on the United States Congress.

CONCLUSION

For the reasons stated, this Court should affirm the Tenth Circuit's interpretation of this Court's decisions in *Metro Broadcasting* and *Fullilove*.

Respectfully submitted,

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In The

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On Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

BRIEF AMICUS CURIAE OF NATIONAL COALITION OF MINORITY BUSINESSES IN SUPPORT OF RESPONDENTS

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BRIEF AMICUS CURIAE OF NATIONAL COALITION OF MINORITY BUSINESSES IN SUPPORT OF RESPONDENTS

INTEREST OF AMICUS CURIAE

National Coalition of Minority Businesses (NCMB) is a nonprofit organization composed of minority-owned businesses, encompassing a wide cross section of racial and ethnic minorities, and individual leaders of a number of other minority trade associations. The members of NCMB include disadvantaged businesses that participate in or have graduated from the Small Business Administration's § 8(a) program, as well as other businesses that have been certified as disadvantaged business enterprises (DBEs), 15 U.S.C. § 644(g) (1988) for purposes of Section 502 of the Small Business Act and/or as small disadvantaged businesses

(SDBs) under the Department of Defense and other federal programs.

NCMB's purposes include promoting the interests of minority businesses, representing the interests of minority businesses before Congress and federal agencies, and collecting and distributing information about issues of concern to minority businesses to members of industry groups, the press and the public. Members of NCMB have repeatedly testified before Congress regarding federal procurement statutes such as the Small Business Administration SDB, DBE and minority business enterprise (MBE) programs which are designed to open opportunities to minority businesses previously foreclosed from participation due to bias or other institutional barriers.

It is important to understand the historical context of the statute that is at issue here, as well as of a host of related statutes that have been enacted to redress the problem of discriminatory exclusion from government procurements. The core concept of providing assistance to businesses owned or controlled by "socially and economically disadvantaged" persons dates back to 1969, when President Nixon issued an executive order directing the Small Business Administration to use its authority under § 8(a) of the Small Business Act to assist small business concerns owned and controlled by such disadvantaged individuals.[1] President Nixon issued this executive order, rather than awaiting congressional action, because of the urgent need to address the urban unrest and other serious problems resulting from discrimination against and disparate treatment of minorities. He recognized the undeniable historical fact that minorities had been unlawfully denied access to participation in the free

[1] Exec. Order No. 11458, 3 C.F.R. 779 (1966-1970 Comp.); Exec. Order No. 11518, 3 C.F.R. 907 (1966-1970 Comp.); Exec. Order No. 11625, 3 C.F.R. 616 (1971-1975 Comp.).

enterprise system and indeed had been deprived of all basic civil rights.

The Congress and President Johnson acknowledged the continuing and disgraceful existence of *de jure* racial discrimination, which they sought to rectify by enacting the major civil rights legislation of the 1960s. President Nixon realized that even this landmark legislation was not enough to remove the effects of hundreds of years of oppression and discrimination against racial minorities, nor to solve the ongoing economic problems of racial bigotry, division and unrest. Thus, it was essential to bring minority groups into the economic mainstream by providing real equality of opportunity to participate in the free enterprise system. Since the federal government is the nation's largest purchaser of goods and services, President Nixon sought to use this market to nuture "black capitalism" (as he called it), to provide minorities with a "business stake in America," and to fulfill the unrealized goals of the civil rights legislation.

In the 1970s Congress undertook a lengthy review of the administrative program created by this executive order and recognized the need to improve and strengthen this program. Thus, for example, the minority set-aside provisions of the Public Works Employment Act of 1977, 42 U.S.C. § 6705 (1988) which were upheld by this Court in *Fullilove v. Klutznick*, 448 U.S. 448 (1980), were expressly linked by Congress to the ongoing § 8(a) program and were motivated in part by Congress' concern over the limited effectiveness of that program in significantly increasing minority business participation in government procurements. *See id.* at 463-67.

Similarly, in 1978, when Congress codified and strengthened the Small Business Administration's program by, among other things, enacting the challenged provisions of Section 502 of the Small Business Act, Congress recognized that minorities continued to lack opportunity to participate fully in the free enterprise system or to secure federal government contracts. Congress' well-

supported findings in this regard are set forth in the Small Business Act itself. *See* 15 U.S.C. § 631(f)(1).

Throughout the 1980s and early 1990s these federal programs to remedy the effects of discrimination and to bring minority groups into the economic mainstream have been the subject of intense and continuing scrutiny by Congress, by the Executive Branch and by the public at large, in each instance resulting in new and additional efforts to remedy the problem. Although these federal programs have resulted in significant gains for disadvantaged businesses, the evidence clearly shows, and every Congress and Administration since the late 1960s has correctly recognized, that the need for these programs has not ended because minorities continue to suffer the effects of systematic and institutional racial discrimination. As recently as September 16, 1994, President Clinton recognized, by Executive Order No. 12928, the continuing need "to enforce vigorously the letter and spirit of public laws that promote increased participation in Federal procurement by Small Businesses Owned and Controlled by Socially and Economically Disadvantaged Individuals."[2]

The federal programs in question are a matter of vital importance to the members of NCMB and to the minority business community at large, as well as to the minority community and the nation as a whole. For example, during fiscal year 1993, the 8(a) program had 4,848 participating business concerns. These 8(a) firms employed 105,800 individuals and won $4.3 billion worth of federal contracts, but even more important, the federal programmatic support has served as a catalyst to enable such firms to compete in the commercial market and earn 57% (or $7.3 billion) of their revenues outside the 8(a)

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[2] Exec. Order No. 12928, Promoting Procurement with Small Business Owned and Controlled by Socially and Economically Disadvantaged Individuals, Historically Black Colleges and Universities, and Minority Universities (Sept. 16, 1994).

program. The existence and success of these and other disadvantaged businesses that benefit from statutes such as Section 502 is a matter of vital economic importance to the minority community as a whole. These businesses have played a major role in providing direct and indirect employment opportunities for minorities, and curtailment of necessary federal programs would therefore have a devastating impact on a major segment of the minority community and the economic health of numerous diverse communities throughout the nation.

Since the arguments raised by Petitioner and its supporting amici threaten the very existence of vital and necessary programs such as Section 502 of the Small Business Act, the issues in this case are of great significance to NCMB.[3]

SUMMARY OF ARGUMENT

The courts below properly held that Section 502 of the Small Business Act, 15 U.S.C. § 644(g) (1988), which provides for the establishment of annual goals for federal procurement from disadvantaged business enterprises (DBEs), is clearly constitutional. This Court has long recognized that Congress has the power to identify and redress the effects of past or present racial discrimination on public contracting, and that Congress' decision to use racial or ethnic criteria in achieving these remedial purposes is entitled to substantial deference. *Fullilove v. Klutznick*, 448 U.S. 448 (1980). The use of race and ethnicity here simply as rebuttable factors in determining whether an individual is socially disadvantaged within the meaning of Section 502 is in fact a considerably more limited use of racial and ethnic criteria than that upheld as an appropriate remedial measure in *Fullilove*. Indeed,

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[3] Pursuant to Rule 37 of the Rules of this Court, letters reflecting the written consent of the parties to the filing of this brief have been filed with the Clerk of the Court.

one of the dissenting Justices in *Fullilove* expressly distinguished the category of Minority Business Enterprises (MBEs) in that case (in which categorization was based solely on race) from the more limited and acceptable use of race as but one factor in defining DBEs under the Small Business Act. *See Fullilove*, 448 U.S. at 335 n.6 (Stevens, J., dissenting).

When Congress enacted Section 502 in 1978, Congress had ample evidence that racial minorities continued to lack equal opportunity to compete for federal government contracts due to barriers erected by decades of severe and odious racial discrimination. Much of this evidence was discussed in *Fullilove* itself, and led Justice Powell to note that "a court must accept as established the conclusion that purposeful discrimination contributed significantly to the small percentage of federal contracting funds that minority business enterprises have received." *Fullilove*, 448 U.S. at 506 (Powell, J., concurring).

In the years following the enactment of Section 502, Congress has continued to revisit the issue of racial discrimination and disadvantaged business enterprises. In 1988, Congress amended Section 502 to provide minimum government-wide goals for participation by small businesses and DBEs. Moreover, Congress has conducted extensive and repeated oversight hearings on issues related to DBEs, considering the views of both proponents and opponents of the DBE provisions of the Small Business Act. These facts should alleviate any concerns that Congress has given merely "perfunctory consideration" to the DBE provisions challenged here. *See Fullilove*, 448 U.S. at 550 (Stevens, J., dissenting).

In short, this Court should reaffirm *Fullilove* and uphold the challenged DBE provisions of the Small Business Act. Failure to do so would cause enormous damage

to thousands of DBE companies (and hundreds of thousands of their employees) that have made major investments of time and money in reliance upon the statutory promise that DBEs will receive the "maximum practicable opportunity" to participate in federal contract awards. *Fullilove* was correctly decided and should be reaffirmed based on settled principles of stare decisis and the continuing need for remedial measures.

ARGUMENT

I. CONGRESS HAS THE AUTHORITY TO IDENTIFY AND REDRESS THE EFFECTS OF SOCIETY-WIDE DISCRIMINATION WITH RESPECT TO FEDERAL PROCUREMENT

In *Fullilove*, this Court upheld a 10% set-aside for MBEs which was contained in Section 103(f)(2) of the Public Works Employment Act (PWEA), Pub. L. 95-28, 91 Stat. 116, 42 U.S.C. §§ 6701-6736 (1988). The PWEA provided federal funds for local public works projects and required that the state and local governments receiving these funds expend at least 10% on goods and services of MBEs. Unlike the DBEs at issue in this case (where race is only one factor in defining the class of disadvantaged persons), MBEs were defined simply as businesses owned by members of specified minority groups.

The principal opinion in *Fullilove*, written by Chief Justice Burger, first asked "whether the *objectives* of this litigation are within the power of Congress." 448 U.S. at 473 (emphasis in original). The Chief Justice noted that the PWEA imposed obligations on prime contractors, as well as state and local governments, because "when the procurement practices of the grantee involve the award of a prime contract to a general or prime contractor, the obligations to assure minority participation devolve upon the private contracting party." *Id.* at 474. The principal

opinion found that "[i]nsofar as the MBE program pertains to the actions of private prime contractors, the Congress could have achieved its objectives under the Commerce Clause" because "[t]he legislative history of the MBE provision shows that there was a rational basis for Congress to conclude that the subcontracting practices of prime contractors could perpetuate the prevailing impaired access by minority businesses to public contracting opportunities, and that this inequity has an effect on interstate commerce." *Id.* at 475-76.

With respect to state and local governments, however, the principal opinion declined to rely on the Commerce Clause as the source of Congress' authority. *See Fullilove*, 448 U.S. at 476 (noting that "there are limitations on the reach of the Commerce Power to regulate the actions of state and local governments"). Instead, the principal opinion concluded that "[i]nsofar as the MBE program pertains to the actions of state and local grantees, Congress could have achieved its objectives by use of its power under § 5 of the Fourteenth Amendment." *Id.* at 478. The Chief Justice stated:

> Although the [PWEA] recites no preambulary "findings" on the subject, we are satisfied that Congress had abundant historical basis from which it could conclude that traditional procurement practices, when applied to minority businesses, could perpetuate the effects of prior discrimination. Accordingly, Congress reasonably determined that the prospective elimination of these barriers to minority firm access to public contracting opportunities generated by the 1977 Act was appropriate to ensure that those businesses were not denied equal opportunity to participate in federal grants to state and local governments, which is one aspect of the equal protection of the laws.

Id.

Petitioner and its supporting *amici* argue that *Fullilove* is inapplicable here because it "addressed Congressional power under § 5 of the Fourteenth Amendment, which is not at issue in this case." Pet. Br. at 32. Thus, one amicus points out that "[w]hile the MBE program in *Fullilove* concerned the ability of a *state* to receive federal funds, the DBE program under review here concerns incentive payments to *individuals* who employ certified DBE's." Brief Amicus Curiae of Pacific Legal Foundation in Support of Petitioner at 18 (emphasis in original).

These attempts to distinguish *Fullilove* are meritless. *First*, the MBE provisions in *Fullilove* did not involve only Congressional authority with respect to state and local governments; on the contrary, the principal opinion in *Fullilove* also found that Congress had adequate authority under the Commerce Clause to impose these provisions on private contractors. Nothing in *Fullilove* suggests that the authority of Congress with respect to such contractors is more limited than with respect to state and local governments. If anything, the principal opinion in *Fullilove* indicates that federalism concerns might impose greater limitations on Congressional authority over state and local governments.

Second, as the district court correctly determined, the DBE program at issue here falls within Congress' Section 5 power to "remedy the effects of disabling discrimination." Pet. App. 34. This Court has held that "[c]orrectly viewed, § 5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment." *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966). In *United States v. Guest*, 383 U.S. 745 (1966), a majority of the Court expressed the view that Congress has the discretion under Section 5 to enact legislation proscribing private conspiracies even where state officers or others acting under color of state law are not involved. 383 U.S. at 761

(Clark, J., joined by Black and Fortas, J.J., concurring); *id.* at 782 (Brennan, J., joined by Warren, C.J., and Douglas, J., concurring). Thus, Congress' Section 5 power is not limited to regulation of state action.[4] Moreover, even if state action were required, this requirement is satisfied here because the purpose of the DBE provisions is to remedy the effects of society-wide discrimination, including discrimination perpetuated by state action.

Finally, even if Section 5 were inapplicable to Congress' attempts to redress the effects of prior discrimination in the area of federal procurement, it is clear that

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[4] Congress has asserted the authority, pursuant to Section 5 of the Fourteenth Amendment, to preclude discrimination by private parties. *See Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 249 (1964). In *Heart of Atlanta Motel*, a majority of the Court did not reach the issue of whether Section 5 provided adequate authority for enactment of the Civil Rights Act of 1964, finding that the commerce power was a sufficient basis for the statute. *Id.* at 250; *see also id.* at 279 ("Because the Civil Rights Act of 1964 as applied here is wholly valid under the Commerce Clause and the Necessary and Proper Clause, there is no need to consider whether this Act is also constitutionally supportable under Section 5 of the Fourteenth Amendment. . . . ") (Black, J., concurring). Two members of the Court, however, would have squarely held that Congress had authority under Section 5, as well as the Commerce Clause, to enact this legislation. *See id.* at 280 (Douglas, J., concurring); *id.* at 293 (Goldberg, J., concurring).

The present case need not resolve the issue left open in *Heart of Atlanta Motel* because here Congress has not sought to preclude private discrimination. Instead, Congress has merely sought to provide equal opportunity to minorities and other disadvantaged persons to participate in the area of federal procurement, which is funded in part by the tax revenues of minority citizens. Congress' power to enforce equal protection guarantees surely is broad enough to ensure that federal procurement activities do not perpetuate the effects of prior discrimination which has deprived minorities and other disadvantaged persons of equal protection of the law.

Congress has equally broad remedial powers to achieve these objectives under other constitutional provisions. For example, in *Fullilove* Chief Justice Burger noted that the Court's review of the MBE provisions must be conducted "with appropriate deference to the Congress, a co-equal branch charged by the Constitution with the power to 'provide for the . . . general Welfare of the United States,' " as well as to enforce the Fourteenth Amendment. 448 U.S. at 472; *see also Metro Broadcasting v. FCC*, 497 U.S. 547, 563 (1990) (*Fullilove* held that "deference was appropriate in light of Congress' institutional competence as the national legislature.").[5]

Fullilove held that the MBE set-aside was within Congress' Section 5 power not because state or local governments were engaging in intentional discrimination or other unlawful conduct but because Congress had reasonably determined that minority businesses attempting to compete for local public works projects were subject to "barriers to competitive access which had their roots in racial and ethnic discrimination." 448 U.S. at 478. It would be utterly illogical, as well as contrary to principles of federalism, to hold that Congress somehow has less power to eradicate the same effects of past discrimination as they appear in the area of federal procurement.

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[5] The challenged DBE provisions here are also valid as an exercise of Congress' powers under the Thirteenth Amendment. *See Fullilove*, 448 U.S. at 510 (Powell, J., concurring) ("[T]he Thirteenth and Fourteenth Amendments confer upon Congress the authority to select reasonable remedies to advance the compelling state interest in repairing the effects of discrimination."). As pointed out by Justice Powell in his concurrence, the Thirteenth Amendment clearly provides Congress with the power to enact legislation regarding private discrimination. *Id.* at 500 (Powell, J., concurring) (citing *Runyon v. McCrary*, 427 U.S. 160, 168-70 (1976)).

Any doubts as to the applicability of *Fullilove* here are resolved by this Court's decision in *Metro Broadcasting*, which upheld the constitutionality of certain FCC policies that treated minority ownership as a favorable factor in decisions regarding license applications. The *Metro Broadcasting* Court specifically rejected the contention that *Fullilove* was applicable only to Congress' exercise of its authority pursuant to Section 5 of the Fourteenth Amendment. 497 U.S. 563 n.11. Moreover, the Court also rejected the argument, raised again by Petitioner and its amici here, that Congress' power to redress racial and ethnic discrimination is no broader than that of state and local governments under *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). The Court stated:

> *Croson* cannot be read to undermine our decision in *Fullilove*. In fact, much of the language and reasoning in *Croson* reaffirmed the lesson of *Fullilove* that race-conscious classifications adopted by Congress to address racial and ethnic discrimination are subject to a different standard than such classifications prescribed by state and local governments.

Metro Broadcasting, 497 U.S. at 565.[6]

Metro Broadcasting held that all benign race-conscious measures mandated by Congress, whether or not remedial, are subject to intermediate scrutiny. NCMB submits, however, that the correctness of this holding is not the

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[6] The dissent in *Metro Broadcasting* provides no support for Petitioner's position here. The dissent found that the "considerable lattitude" enjoyed by Congress under *Fullilove* was inapplicable to the FCC minority preference policies since those policies did not involve Congress' powers under § 5 of the Fourteenth Amendment, nor did they involve congressional measures seeking to remedy identified past discrimination. See 497 U.S. at 605-07 (O'Connor, J., dissenting). The present case is like *Fullilove*, and unlike *Metro Broadcasting*, in both those respects.

real issue before the Court in the case at bar. Rather the issue is whether Congress, unlike state or local governments, has the power "to identify and redress the effects of society-wide discrimination" by using the type of remedies upheld in *Fullilove*. *See Croson*, 448 U.S. at 720. If the answer to this question is affirmative, as it must be under *Fullilove*, *Croson* and *Metro Broadcasting*, then the challenged DBE provisions here survive either strict or intermediate scrutiny. Indeed, in *Fullilove* itself, Chief Justice Burger noted that the MBE provisions of the PWEA (which, as shown below, raise more significant constitutional concerns than do the challenged DBE provisions in this case) would survive either type of scrutiny. *See* 448 U.S. at 492.

II. THE EVIDENTIARY REQUIREMENTS OF *FULLILOVE* ARE SATISFIED HERE

The principal opinion in *Fullilove* contains an extensive review of the legislative history not only of the PWEA, but of other administrative and legislative programs designed to promote minority opportunities, particularly those related to Section 8(a) of the Small Business Act. *See* 448 U.S. at 463 ("The legislative objectives of the MBE provision must be considered against the background of ongoing efforts directed toward deliverance of the century-old promise of equality of economic opportunity."). Based on this review, the Chief Justice concluded that "Congress had abundant evidence [when it enacted the PWEA in 1977] from which it could conclude that minority businesses have been denied effective participation in public contracting opportunities by procurement practices that perpetuated the effects of prior discrimination." *Id.* at 477-78. The Chief Justice further noted that "much of this history related to the experience of minority businesses in the area of federal procurement." *Id.* at 478; *see also id.* at 506 ("In light of these

legislative materials and the discussion of legislative history contained in THE CHIEF JUSTICE'S opinion, I believe that a court must accept as established the conclusion that purposeful discrimination contributed significantly to the small percentage of federal contracting funds that minority business enterprises have received.") (Powell, J., concurring).

Fullilove thus clearly establishes that when in 1978 Congress first amended the Small Business Act to require federal agencies to provide the "maximum practicable opportunity" for DBEs to participate in the performance of federal contracts, it had ample evidence that federal procurement practices were perpetuating the effects of prior discrimination. *See* Pub. L. No. 95-507, 92 Stat. 1770 (1978). The legislative history notes that "in many, but not all, cases status as a minority can be directly and unequivocally correlated with social disadvantagement and this condition exists regardless of the individual, personal qualities of that minority person." H.R. Conf. Rep. No. 95-1174, 95th Cong., 2nd Sess., *reprinted in* 1978 U.S.C.C.A.N. 3882. It also notes that "other Americans may also suffer from social disadvantagement because of cultural bias. For example, a poor Appalachian white person who has never had the opportunity for a quality education or the ability to expand his or her cultural horizons, may similarly be found socially disadvantaged, provided that the conditions leading to such disadvantagement are beyond the ability of the person to control." *Id.*

This legislative history demonstrates that Congress was not engaging in racial stereotyping or simply favoring certain racial groups over others. Rather Congress was attempting to remedy the effects of discrimination by identifying a "class of socially or economically disadvantaged persons [which] neither included all persons in the racial class nor excluded all nonmembers of the racial

class. Race was used as no more than a factor in identifying the class of the disadvantaged." *Fullilove*, 448 U.S. at 535 n.6 (Stevens, J., dissenting).

The legislative history also shows that Congress has not given merely "perfunctory consideration" to the DBE classifications at issue here. *See Fullilove*, 448 U.S. at 550 (Stevens, J., dissenting). Rather Congress has given serious and continuing attention to the effects and implications of the DBE provisions of federal law. For example, the Report of the Senate Committee on Environment and Public Works, which accompanied the Surface Transportation and Uniform Relocation Assistance Act of 1987 (STURAA), states that "[t]he Committee has considered extensive testimony and evidence on the bill's DBE provisions, and has concluded that this provision is necessary to remedy the discrimination faced by socially and economically disadvantaged persons attempting to compete in the highway and mass transit construction industry." S. Rep. No. 100-4, 100th Cong., 1st Sess., *reprinted in* 1987 U.S.C.C.A.N. 76. Moreover, the Committee also considered the views and perspectives of nonminorities impacted by the DBE provisions:

> The DBE program implemented by the Department of Transportation following enactment of section 105(f) operates primarily as a subcontracting program, under which prime contractors must make good faith efforts to achieve DBE subcontracting goals. The Committee has studied the materials presented by nonminority subcontractors regarding the program's impact on their businesses. The increased funding for highway and mass transit construction projects has increased the opportunities for subcontractors to compete, and the good faith efforts provision of the program assures that the program does not operate as a quota. Also, since DBE firms compete in many areas of subcontracting,

> any burden that might be imposed by this program is spread among different groups of subcontractors.

1987 U.S.C.C.A.N. 76.

Congress has held numerous and extensive oversight hearings to determine the impact of and continuing need for the DBE provisions.[7] Congress has also conducted a nationwide survey of DBEs that had participated in the Small Business Administration 8(a) program.[8] Based on testimony and evidence from these and many other sources, including annual reports from federal agencies regarding the attainment of DBE contracting goals, Congress has concluded that the DBE provisions remain necessary to meeting the objective of "promot[ing] the business development of small business concerns owned and controlled by socially and economically disadvantaged individuals so that such concerns can compete on an equal basis in the American economy." 15 U.S.C. § 631(f)(2)(A); *see* 1987 U.S.C.C.A.N. 76 (despite progress

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[7] See, e.g., *Hearings on Federal Contracting Opportunities for Minority and Women-Owned Businesses: An Examination of the 8(d) Subcontracting Program Before the Senate Comm. on Small Business*, 98th Cong., 1st Sess. (1983); *Hearings on the State of Hispanic Small Business in America Before the Subcomm. on SBA and SBIC Authority, Minority Enterprise and General Small Business Problems of the House Comm. on Small Business*, 99th Cong., 1st Sess. (1985); *Hearings on Minority Enterprise and General Small Business Problems Before the Subcomm. on SBA and SBIC Authority, Minority Enterprise and General Small Business Problems of the Comm. on Small Business*, 99th Cong., 2d Sess. (1986).

[8] Report of the Senate Committee on Small Business, Survey of the Graduates of the Small Business Administration Section 8(a) Minority Business Development Program (hereinafter "8(a) Survey"), S. Rep. No. 394, 100th Cong., 2d Sess. App. A (1987).

resulting from DBE provisions "barriers still remain, preventing minorities and women from successfully competing in the industry").[9]

Petitioner asserts that any "pattern or practice of racial discrimination . . . was cured long ago." Pet. Br. at 36. Unfortunately, there is more than ample evidence to contradict this unsupported statement. The results of institutional discrimination continue – minorities still own a disproportionately low number of businesses in the United States and to receive a disproportionately small amount of business revenue.[10] For example, in 1987 fewer than 1% of the 89,897 American construction firms

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[9] The Senate's 1986 Survey of 8(e) Program Graduates demonstrated that "graduated" firms (*i.e.*, those that had completed the limited participation term in the 8(a) program) faced an inordinately high failure rate. 8(a) Survey, *supra* note 8. This is further evidence that disadvantaged businesses continue to face institutional bias and discrimination as substantial barriers to their access to governmental and private markets, credit and capital.

[10] As one commentator notes:

> The black business participation rate is only about one-quarter of the national average. While blacks make up twelve percent of the population, they own only two percent of all business firms. In 1982, only sixteen dollars of every $10,000 in business receipts, less than two-tenths of one percent, came from black-owned firms. Black business receipts would have to increase seventy-five-fold before they would be proportionate to the black share of the total population. Perhaps present discrimination against minority businesses explains the persistence of some of this disparity.

R. Suggs, *Racial Discrimination in Business Transactions*, 42 Hastings Law Journal 1257, 1264 (1991) (footnotes omitted); *see also id.* at 1264 n.41 (noting that "[o]ther minorities also are underrepresented in business activity").

with annual receipts of $1 million or more were owned by minorities.[11] Partly as a result of these facts, minority unemployment consistently runs as much as double that of the rest of the population, and minority income and wealth lags far behind that of the majority.[12]

Minority-owned businesses have made significant progress in the area of federal procurement directly due to Congressional enactments. For example, in the 1970s the value of federal contracts awarded to minority firms amounted to less than 1% of the total. *See Fullilove*, 448 U.S. at 536 n.7 (Stevens, J., dissenting). Today, due to these programs, minority-owned businesses are awarded only 4% of the value of federal contracts.[13] This limited progress is the direct result of DBE provisions such as those challenged here; the fact that these provisions are working is evidence that they are still needed. Moreover, even with the DBE provisions, the percentage of federal contracts awarded to minority-owned businesses is still far below the percentage of minorities in the overall

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[11] *See* Bureau of the Census, U.S. Dep't of Commerce, Pub. No. ES87-3, 1987 Enterprise Statistics (cited in Note, *Fighting Construction Projects After Croson: A Title VI Litigation Strategy*, 101 Yale Law J. 1577, 1600 n.113 (1992)).

[12] The United States Census Bureau has reported that white households have more than 10 times the median wealth of African-American households. The median white household income also far exceeds that of African-American households. *See Huge Disparity in Wealth Found Among Races*, Wash. Post, Jan. 11, 1991, at A3, col. 1.

John Jacobs, the president of the National Urban League, commented that African-Americans are "not going to move toward a position of parity without increasing the wealth of [African-American] communiti[es] and we can't do that without doing something about . . . business ownership. . . . " *Id.* at A3, col. 3.

[13] *See* Commentary, *In the Minority: The 8(a) Program Isn't a Giveaway*, 13 Wash. Bus. J. 15 (week of Aug.12-18, 1994).

population (20%), and the percentage of minority businesses out of total U.S. businesses (9%).

Both Congress and the Executive Branch have recognized the need for continuing efforts to assist minority-owned businesses. For example, in 1988 Congress amended Section 502 to *strengthen* the DBE provisions by providing a minimum 5% government-wide goal for contracting with DBEs. Pub. L. No. 100-656, 1988 U.S.C.C.A.N. 102 Stat. 3881. Congress has also enacted a number of other statutes, one as recently as 1992, to provide similar DBE goals for specific agencies.[14] President Clinton, just a few months ago, issued Executive Order No. 12928 which recognized the continuing vital importance of these federal programs to assist DBEs. These facts decisively refute Petitioner's suggestion that Section 502 is a relic of the past.

In short, the problems that President Nixon first tried to address in 1969 with the § 8(a) program and that congress has attempted to address with numerous pieces of legislation from the 1970s to the present have not disappeared. These problems – such as poverty, high unemployment, lack of access to capital, and continuing job and lender discrimination – are with us today. Petitioner's attack on Section 502, if successful, would undermine the vital federal programs designed to redress these problems and reverse the progress that has been made in securing access by minorities and other disadvantaged

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[14] *See, e.g.*, Pub. L. No. 102-486, 1992 U.S.C.C.A.N. 106 Stat. 3133 (Department of Energy); Pub. L. No. 101-167, 1988 U.S.C.C.A.N. 103 Stat. 1249 (Agency for International Development); Pub. L. No. 99-661, 1987 U.S.C.C.A.N. 101 Stat. 1127 (Department of Defense); Pub. L. No. 101-510, 1990 U.S.C.C.A.N. 101 Stat. 1607 (Department of Defense); Pub. L. No. 101-507, 1990 U.S.C.C.A.N. 104 Stat. 1374 (Environmental Protection Agency); Pub. L. No. 101-144, 1989 U.S.C.C.A.N. 103 Stat. 863 (NASA).

persons to the free enterprise system in general and to the federal procurement system in particular, and in short order the basic causes of urban unrest (at least those that have been ameliorated by these programs) would be greatly exacerbated.

Congress is not required to make findings of discrimination by specific market, by specific industry or by specific agency, as have been variously suggested by Petitioner and its supporting amici.[15] *See Croson*, 448 U.S. at 504 ("Congress has made national findings that there has been discrimination in a host of fields"). However, NCMB notes that a major study was recently conducted regarding discrimination against minorities and women in the construction and professional design industries in the six county Metropolitan Statistical Area of Denver, Colorado.[16] This study concluded that "[t]here exists strong evidence of race and gender-based discrimination in the construction and professional design industries."[17]

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[15] For example, one amicus argues that "[a]t a minimum, the statistical evidence must: (1) relate to a defined and relevant market; (2) compare comparably qualified and available minority and non-minority firms within that market; (3) control for such race-neutral, market-relevant variables as firm size and experience; (4) calculate the disparity ratio for each minority group granted preferential treatment; and (5) identify, alone or in conjunction with anecdotal evidence, the discriminatory practices at fault in the relevant market." Brief Amicus Curiae of the Associated General Contractors of America, Inc., in Support of Petitioner at 19. Such standards are more reminiscent of an appellate court's review of a verdict in an antitrust action than of the deference due to Congress as a co-equal branch charged by the Constitution with the power to provide for the general welfare and to enforce the equal protection guarantees of the Fourteenth Amendment. *See Fullilove*, 448 U.S. at 472.

[16] Denver City Council, *Denver Disparity Study: Construction and Professional Design Services* (1990).

[17] *Id.* at ES-7.

This evidence included statistics showing that "[s]ubstantially fewer minority construction firms have been formed and survived than would be expected given the relative size of the minority construction work force."[18] In addition, the study accumulated considerable evidence of specific acts of discrimination as related in testimony, interviews and affidavits, such as:

> A minority was interviewed and supplied an affidavit which contained three very specific examples of race discrimination against his company. All of the examples involved discrimination by City officials. One example involved bid shopping to a majority-owned firm. A second involved a racial slur. The third involved retaliation for the filing of a complaint with the Affirmative Action Office. Certain pertinent facts set forth in the affidavit were verified by examination of detailed company records.[19]

In the final analysis, however, Congress' institutional competence and discretion to enact remedial legislation such as that at issue here does not depend on specific statistical studies or testimony regarding particular acts of discrimination. In the first place, "Congress, of course, may legislate without compiling the kind of 'record' appropriate with respect to judicial or administrative proceedings." *Fullilove*, 448 U.S. at 478. More fundamentally, Congress' objective here is not simply to compensate individual victims of discrimination. Indeed, it would be impossible for Congress, or even a court, to determine exactly how and to what extent individuals have been

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[18] *Id.* at V11-2 to V-3; *see generally id.* at V1-6 to V1-11; V11-1 to V11-11.

[19] *Id.* at V11-2 to V-3; *see generally id.* at V1-6 to V1-11; V11-1 to V11-11.

injured by the type of society-wide discrimination Congress is attempting to remedy.[20]

Congress' primary objectives, as expressed in the Small Business Act itself, look toward the future benefits to all Americans of eliminating the barriers to full participation in our free enterprise system by socially and economically disadvantaged persons. *See* 15 U.S.C. § 631 (f)(1)(A). Achieving such full participation will not only be a major step in ending the hateful and hurtful legacy of racial and ethnic discrimination in this country, but will improve the functioning of the national economy, ameliorate the economic conditions of disadvantaged groups, increase competition in federal procurement and better equip this nation of diverse racial and ethnic groups to compete effectively in a truly diverse global economy. Any retreat from these noble (and as yet unfulfilled) objectives would be a disgrace to and a disaster for this nation.

III. THE DBE PROVISIONS AT ISSUE HERE ARE MORE NARROWLY TAILORED AND FLEXIBLE THAN THE STATUTORY PROVISIONS UPHELD IN *FULLILOVE*

The argument that the DBE provisions of the Small Business Act raise greater constitutional concerns that the

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[20] *See generally*, George R. LaNoue & John Sullivan, *"But for" Discrimination: How Many Minority-Owned Businesses Would There Be?*, 24 Columbia Human Rights L. Rev. 293 (Winter 1992-93). Amici for Petitioner have cited this article favorably for its criticism of disparity studies such as that conducted in Denver. However, the real thesis of this article is that there is no way of proving how many minority-owned businesses would exist if discrimination had never occurred. The fact that this cannot be proved in a narrow judicial sense, however, does not mean that Congress is without competence to redress the effects of discrimination. On the contrary, it argues in favor of granting Congress a considerable degree of lattitude in choosing the means of redress.

MBE provisions upheld in *Fullilove* is simply unsupportable. On the contrary, as Justice Stevens pointed out in his *Fullilove* dissent, the truth is the exact opposite – merely considering race as a factor in determining disadvantage, as do the DBE provisions here, presents significantly *fewer* constitutional concerns than did the *Fullilove* statute:

> [T]he SBA's class of socially or economically disadvantaged persons neither included all persons in the racial class nor excluded all nonmembers of the racial class. Race was used as no more than a factor in identifying the class of the disadvantaged. The difference between the statutory quota involved in this case and the SBA's 1968 description of those whose businesses were to be assisted under § 8(a) of the Small Business Act is at least as great as the difference between the University of California's racial quota and the Harvard admissions system that Mr. Justice POWELL regarded as critical in *University of California Regents v. Bakke*, 483 U.S. 265, 315-318, 98 S. Ct. 2733, 2761-2763, 57 L. Ed. 2d 750.

Fullilove, 448 U.S. at 536 n.6 (Stevens, J., dissenting).

The 10% set-aside upheld in *Fullilove* applied solely to businesses owned by specified racial minorities. This provision was attacked both as underinclusive – since its benefits were not extended to all businesses that might be disadvantaged – and overinclusive – since its benefits might be received by some minority-owned businesses that were not really disadvantaged. *See Fullilove*, 448 U.S. at 485-87. Chief Justice Burger rejected the former argument on the ground that extending the statute to all disadvantaged persons was an appropriate function of Congress, not of the courts. *Id.* at 485. The Chief Justice rejected the latter argument on the ground that the administrative program implementing the MBE provisions contained sufficient flexibility to ensure that benefits would not go to "spurious minority-front entities" or

other MBEs that were not bona fide. *Id.* at 487-88. Moreover, a state or local government (although not a private contractor) could obtain a partial or total waiver of the 10% MBE set-aside if it could demonstrate that it was unable to achieve compliance despite its best efforts. *Id.* at 488.

As the court of appeals and district court correctly held, these standards demonstrate that the challenged DBE provisions here are narrowly tailored to achieve Congress' remedial objectives. Pet. App. 22-23, 35-56. Indeed, the DBE provisions are significantly better tailored and more flexible than the statute upheld in *Fullilove*.

First, unlike the *Fullilove* statute, the DBE provisions permit nonminority firms to qualify as DBEs.[21] 13 C.F.R. § 124.105(c). This is consistent with Congress' intent. *See* 1978 U.S.C.C.A.N. (92 Stat.) 3882. Firms owned by nonminorities (for example, white males who are physically disabled) have in fact been certified as DBEs by the Small Business Administration.[22]

Moreover, Petitioner is incorrect when it asserts that "only racial minorities . . . are entitled to a presumption of 'disadvantage'." Pet. Br. at 22. In fact, in the House Conference report to the Surface Transportation and Uniform Relocation Assistance Act of 1987 (STURAA), Pub. L. No. 100-17, 101 Stat. 132, Congress expressed its intent that women (including nonminority women) also be included in the rebuttable presumption of disadvantage. H.R. Conf. Rep. No. 100-27, 100th Cong., 1st Sess., *reprinted in* 1987 U.S.C.C.A.N. 132. Consistent with this

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[21] The assertion by one amicus that "nonminorities may never qualify as DBEs" is simply incorrect. *See* Brief Amicus Curiae of Pacific Legal Foundation in Support of Petitioner at 17.

[22] *See, e.g.*, Neil Munro, *8(a) Program Accused of Political Incorrectness*, 9 Wash. Tech. 1, 16 (Sept. 29, 1994).

intent, the Subcontracting Compensation Clause (SCC) at issue in this case indicates that women-owned businesses fall within the rebuttable presumption. *See* Joint App. at 14.

Second, unlike the statute in *Fullilove*, the DBE provisions here do not extend benefits to all firms genuinely owned by bona fide minorities. Although an individual who is a member of a minority group is presumed to be socially disadvantaged, this presumption is rebuttable. *See* 13 C.F.R. § 124.105(b) ("In the absence of evidence to the contrary, the following individuals are presumed to be socially disadvantaged . . . . "). If evidence exists "to the contrary," the ultimate question is whether the individual meets the definition of "socially disadvantaged," *i.e.*, those individuals "who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities." 15 U.S.C. § 637(a)(5); 13 C.F.R. § 124.105(a).

Even if an individual is established to be socially disadvantaged, moreover, his or her firm does not automatically qualify as a DBE. In the first place, the firm must qualify as a small business concern within the meaning of the Small Business Act. 15 U.S.C. § 637(a)(4)(A); 13 C.F.R. § 124.102. Thus, a large business owned by a minority can never qualify as a DBE.

In the second place, the socially disadvantaged individual must also be *economically* disadvantaged in order to meet the requirements of the DBE program. 15 U.S.C. § 637(a)(6). In determining whether an individual is economically disadvantaged, the Small Business Administration will consider:

(1) the personal financial condition of the individual claiming disadvantage;
(2) the financial condition of the individual's firm; and
(3) the firm's access to credit, capital and markets.

13 C.F.R. § 124.106(a)(2).[23]

In short, it is simply not true to state, as Petitioner does, that "[t]he Small Business Act not only employs race as a factor, race is the only factor." Pet. Reply at 2. On the contrary, numerous factors are considered in making the determination of DBE status. Minority status is no guarantee of certification as a DBE; on the contrary, the Small Business Administration rejects many minority applicants for its 8(a) program.

Finally, the DBE requirements at issue here are at least as flexible as the *Fullilove* statute. Under Section 502 of the Small Business Act, each federal agency participates in setting its own annual goal for participation by DBEs. 15 U.S.C. § 644(g)(1). If the agency fails to meet its goal, it is required only to provide an "appropriate justification" for this failure in an annual report. 15 U.S.C. § 644(h)(1). There is no sanction for failing to meet a goal. Pet. App. 9 n.7. Thus, in essence each agency is free to grant itself a waiver of its own goal.

Moreover, unlike *Fullilove*, this case does not involve any obligation at all imposed upon private contractors. In *Fullilove* prime contractors were required to meet MBE subcontracting goals and did not even have the right to seek a waiver of these goals. In the case at bar no requirement at all has been imposed upon the prime contractor; it was merely offered an additional financial inducement to subcontract to DBEs. If the prime contractor did not wish to do so, it would still retain its contract at the price it had bid.

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[23] Similarly, under STURAA Congress has directed states to make DBE determinations based upon minimum uniform criteria including on-site visits, personal interviews, licenses, analysis of stock ownership, listing of equipment, analysis of bonding capacity, listing of work completed, resume of principal owners, financial capacity and type of work preferred. Pub. L. No. 100-17, 101 Stat. 146 (1987).

Petitioner argues that Section 502 of the Small Business Act enforces a "near limitless preference" because each federal agency is directed to establish goals at a "maximum practicable" level. Pet. Br. at 40-41. In fact, this is a wholly speculative concern. There is no suggestion that any agency has set its goal at a level that exceeds or even approaches the percentage of socially and economically disadvantaged individuals in the population. If the day comes when it is "practicable" for an agency to do so, then Congress may very well decide that Section 502 and similar provisions are no longer necessary. Based on historical data, however, such an occurrence is not likely to occur anytime in the near future.

IV. PRINCIPLES OF *STARE DECISIS* MILITATE AGAINST OVERRULING *FULLILOVE*

Accepting Petitioner's arguments in the case at bar would mean a radical reduction in the scope of Congress' authority to engage in remedial race-conscious measures, as the authority has been understood by Congress in the wake of *Fullilove* and subsequent decisions. *See* 1987 U.S.C.C.A.N. (101 Stat.) 76 (noting that the DBE provisions of the 1982 Surface Transportation Assistance Act and the 1987 STURAA were modeled on the statute found valid in *Fullilove*). Reversal of the court of appeals here would mean the explicit or implicit overruling of *Fullilove* and later decisions reaffirming it.

NCMB submits that these precedents should not be overruled not only because they were correctly decided in the first instance but because settled principles of *stare decisis* militate against it. In determining whether to overrule a prior holding, this Court's "judgment is customarily informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to guage the respective costs of reaffirming and overruling a prior case." *Planned Parenthood v. Casey*, 112

S. Ct. 2791, 2808 (1992). These considerations require reaffirming, not overruling, *Fullilove*.

The most important consideration here is that of reliance, "which counts the cost of a rule's repudiation as it would fall on those who have relied reasonably on the rule's continued application." *Planned Parenthood*, 112 S. Ct. at 2809. A major purpose of statutes such as Section 502 of the Small Business Act, the 8(a) program and the DBE provisions of STURAA is to encourage socially disadvantaged persons to form businesses and encourage certified DBEs to make substantial investments of time and money in expanding their operations. *See, e.g.*, 15 U.S.C. § 631(f)(1)(G).

In the 14 years since *Fullilove* was decided, thousands of DBEs, including many members of NCMB, have been formed. These DBE companies have invested many millions of dollars in their businesses in reliance upon the promises made to DBEs in the Small Business Act and other statutes. If it had not been for these statutes, and for this Court's decision in *Fullilove* upholding Congress' authority to enact such legislation, many DBEs would never have been created, and many investments would never have been made or would have been otherwise directed.

An example of the type of reasonable reliance induced by these statutes is provided by the 8(a) program, which is intended not only to help small disadvantaged businesses obtain federal contracts but also to provide such businesses with direct management, technical, and financial assistance. The 8(a) program recognizes that it takes many years of assistance before disadvantaged businesses are prepared to "graduate" and compete without 8(a) assistance. Congress has provided that participants may remain in the program for nine years. 15 U.S.C. § 636(j)(15). This represents an increase in the length of the program, which was previously five to seven years, because Congress recognized that a high

proportion of "graduated" 8(a) firms were failing. It is clear, therefore, that the precipitous withdrawal of assistance from 8(a) firms and other DBEs that have relied on federal assistance can and will have a devastating impact on their economic survival.

Other considerations also militate against overruling *Fullilove*. *Fullilove*'s holding has in no sense proven "unworkable." *See Planned Parenthood*, 112 S. Ct. at 2809. Far from creating many difficult cases, the standards contained in *Fullilove* provide Congress with an appropriate measure of flexibility and discretion in addressing the issue of past and present racial discrimination. The DBE provisions at issue here easily pass muster under these standards.

Indeed, it would be the overruling of *Fullilove* that could very well prove to be unworkable. Congress has wrestled with and continues to wrestle with the difficult policy issues concerning disadvantaged business enterprises, including how to define which persons are suffering the effect of discrimination, how to ensure that previously excluded groups receive a real opportunity for equal participation in the free enterprise system, how to direct benefits toward the truly disadvantaged and how to achieve all of this without imposing huge costs on the government procurement system. Petitioner and its amici would replace Congress' policy judgments on these issues with rigid rules of evidence that would lead to massive litigation and at the same time defeat Congress' remedial purposes. It would not be long before the chilling effect of overturning *Fullilove* would result in the reversal of more than 20 years of slow but steady progress in securing inclusion of minorities and women in the federal procurement system.

Another factor supporting reaffirmance of *Fullilove* is that no subsequent decisions have developed principles of law that undermine the original holding. *See Planned Parenthood*, 112 S. Ct at 2810. Petitioner argues that this

Court's holding in *Croson* undermines *Fullilove*, but in fact *Croson* went to great lengths to distinguish *Fullilove*, involving the power of Congress to engage in remedial race-conscious measures, from the issues presented by a state or local government's attempt to exercise such power. Moreover, *Metro Broadcasting* reaffirmed the applicability of *Fullilove*, rather than *Croson*, to race-conscious measures mandated by Congress.

Finally, the 14 years since *Fullilove* have not seen a change in the facts which underlay that decision. *See Planned Parenthood*, 110 S. Ct. at 2811. As already discussed, the effects of discrimination have not been eradicated. The overruling of *Fullilove* would certainly create the public perception that the only "fact" that has changed is the membership of the Court.

CONCLUSION

For the reasons set forth above, the judgment of the Court of Appeals for the Tenth Circuit should be affirmed.

Respectfully submitted,

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No. 93-1841

In the
Supreme Court of the United States
October Term, 1994

ADARAND CONSTRUCTORS, INC.,
Petitioner,

v.

FEDERICO PENA, Secretary of Transportation et al.,
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

MOTION FOR LEAVE TO FILE AMICUS BRIEF

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MOTION FOR LEAVE TO FILE AMICUS BRIEF

AMICI CURIAE, Maryland Women Business Entrepreneurs Association, et. al., state the following in support of their Motion for Leave to File Amicus Brief:

1. The parties granted Amici consent to file a brief in support of Respondents. The consents of both parties are on file with the Clerk of this Court.

2. Amici filed their brief on December 6, 1994. It was timely filed under Rule 29.2 which states that briefs may "be sent to the Clerk by first-class mail, postage prepaid, and bear a postmark showing that the document was mailed on or before the last day for filing." (See Affidavit of Service attached as Exhibit 1.)

3. In a Scheduling Order, the Court established a filing deadline of December 6, 1994 at 3:00 p.m. and suspended the language of Rule 29.2 quoted above. Amici had no

knowledge of the rule suspension for the manner of filing amicus briefs.

4. Counsel for Amici had previously confirmed with counsel for Respondent that the filing date was December 6, 1994. Counsel for Respondent failed to inform counsel for Amici of the suspension of the rule relating to the manner of filing.

5. Amici's brief was not received by the Court on or before 3:00 p.m. on December 6, 1994.

6. Had Amici known of this rule suspension, they would have personally filed their brief with the Clerk on or before 3:00 p.m. on December 6, 1994.

7. Amici's brief addresses issues raised by Petitioner in its Petition for Writ of Certiorari as they relate to women and women-owned businesses. (See copy of Amici's brief attached as Exhibit 2.)

8. The Court's review of Amici's brief will aid it in understanding the statutory and regulatory framework of the legislation in question and in fully understanding how past precedents regarding gender discrimination relate to the questions presented.

9. Amici are not aware that any other party or Amici are addressing these issues relating to women-owned businesses. Therefore, the failure to grant this motion may result in an opinion that does not fully and fairly address the impact on women-owned businesses.

Wherefore, Amici Curiae request that this Court enter an Order giving leave to Amici to file their brief.

Date: December 7, 1994 By: _____

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CONSENT FOR FILING

This brief is being submitted with the consent of the parties. Their letters of consent have been filed with the Clerk of the Court pursuant to Rule 36.2 of the Rules of this Court.

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INTERESTS OF AMICI CURIAE

The Coalition for Economic Equity is an *ad hoc* group, composed of individuals and organizations who joined forces in the spring of 1983 to address the problem of access to San Francisco's contracting by minority-owned and women-owned businesses. Many of the members supported the initial request of two members of the Board of Supervisors to have the Human Rights Commission of the City and County of San Francisco conduct hearings on practices of City authorities of seeking outside contractors to provide specific goods and services for their agencies. Others joined the Coalition when the results of those hearings were announced: less than 3% of city contracts in the previous year had been awarded to either minority or women prime contractors.

The Coalition has worked to inform the general public about the nature of the problem and the proposed solutions. The Coalition advocates in other forms in support of similar programs. Indeed, the Coalition intervened in Associated General Contractors of California v. Coalition for Economic Equity, 950 F.2d 1401 (9th Cir. 1991).

The Mid-Peninsula Minority Contractors Association (MPMCA) is a group of local minority contractors, bonding together, as in times past, to assist and participate in the rebuilding and redevelopment of minority low-income communities. MPMCA is dedicated to the proposition that its members should attempt to perform the work in their community that has usually been performed by outsiders.

This organization has come together to participate in the economic and structural development of its community. MPMCA seeks to provide guidance, construction education, project estimates, information sources, and quality assurance in local construction projects. MPMCA fully expects that the organization and its members will be competing for contracts under § 502 of the Small Business Act; § 106 of the Surface Transportation and Uniform Relocation Assistance Act of 1987 and similar programs.

SUMMARY OF THE ARGUMENT

Petitioner is requesting that this Court overrule its decisions in Fullilove v. Klutznick, 448 U.S. 448 (1980), and Metro Broadcasting, Inc. v. Federal Communications Commission, 497 U.S. 547 (1990). However, the doctrine of *stare decisis* is not a doctrine that should be lightly cast aside. Precedents of this Court have established factors to be considered for determining the appropriateness of overruling or reconsidering earlier decisions, and petitioner has not shown that those factors are present in this instance. A review of the factors this Court has established as guideposts for establishing the propriety for the reconsideration or overruling of previous decisions indicates that Fullilove and Metro are well outside the standards embodied in the various factors, and therefore that these cases should not be overruled.

Fullilove and Metro constitute no departure from recent race-conscious jurisprudence established by this Court starting with Regents of the University of California v. Bakke, 438 U.S. 265 (1978). In addition, a reversal of Fullilove and Metro would frustrate substantial reliance on these opinions in the area of race conscious relief. Finally, there has been no indication that either of these decisions have been ineffective, are out of step with the times, or should be revisited in light of new information.

This legislation is a valid exercise of congressional power under the enforcement clauses of the Civil War Amendments, and thus calls for unusual judicial deference upon review. The enforcement clauses grant Congress broad authority to address racial inequities. When doing so, Congress has wide rein to choose means with which to proceed.

A review of local contracting studies reveals that in the absence of affirmative action programs minority businesses are regularly underutilized, given their availability. The need for legislation to eradicate discrimination in government contracting is well-documented, and is still very much present. Programs such as this one are a necessary and effective step toward eradicating the effects of racial discrimination.

Finally, the delegation to state and federal agencies of authority to set the precise terms of the preferences at issue is well within constitutional bounds. Such delegation contributes to precision in tailoring the program to the affected communities.

ARGUMENT

The statute and its application in this instance are clearly constitutional under the decisions of this Court, and there is no compelling justification for overruling these decisions. For the following reasons, the decision of the Tenth Circuit in this case should be affirmed.

I. THE NECESSARY HEAVY BURDEN IMPOSED FOR THIS COURT TO DISAVOW ITS DECISIONS IN FULLILOVE V. KLUTZNICK AND METRO BROADCASTING, INC. V. FEDERAL COMMUNICATIONS COMMISSION HAS NOT BEEN MET IN THIS CASE, AND THEREFORE, RECONSIDERATION OF THOSE DECISIONS IS INAPPROPRIATE AND UNWARRANTED.

This Court has stated many times that the doctrine of *stare decisis* is one that should not be lightly cast aside. See, e.g., Arizona v. Rumsey, 467 U.S. 203, 212 (1984); Vasquez v. Hillery, 474 U.S. 254, 266 (1986); Illinois Brick Co. v. Illinois, 431 U.S. 720, 736 (1977).

In fact, the doctrine of *stare decisis* was very recently defined by this Court in Vasquez, supra at 266, as being "[t]he means by which we ensure that the law will not merely change erratically, but will develop in a principled and intelligent manner." The Court went on to discuss what was meant by that definition by stating that the doctrine thereby allows society to rest assured that certain legal principles would be firmly established and not subject to the changing whims of personal or popular trends. Id. Thus the Court reiterated the fact that legal precedent is controlling in the judicial sphere of this society rather than people. Principle rather than personnel must be the controlling factor. These statements must be considered within the context of

the present case.[1]

In this case there is nothing in constitutional jurisprudence that mandates a departure from this doctrine of *stare decisis*. Indeed, the issue that has been placed before this Court is one that in no way fits the traditional standards that this Court has fashioned for the overruling of decisions.

In Monell v. New York Dept. of Social Services, 436 U.S. 658, 695-701 (1978), this Court articulated four factors to be considered for determining whether decisions should be overruled. The factors discussed in Monell are as follows: whether the decision constituted a departure from prior decisions, whether overruling these decisions would be inconsistent with more recent expressions of congressional intent, whether overruling these decisions would frustrate legitimate reliance on these holdings, and whether the decisions in question misconstrued the meaning of the statute as revealed in the legislative history.[2] A careful analysis of these factors compels the determination that reconsideration and overruling of Fullilove and Metro is inappropriate and unwarranted.

A. The Decisions In Fullilove and Metro Do Not Constitute A Departure From Recent Decisions Of This Court.

Fullilove has been the seminal decision defining the appropriate boundaries of congressional power and duty to attack and eradicate all remnants of slavery and discriminatory practices perpetuated on various minority groups. Indeed, Fullilove has been cited repeatedly as the case that has outlined and defined the

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[1]The fact that this case involves a constitutional challenge does not alter the fact that the strictures of *stare decisis* are to be observed absent special justification. See, e.g., Arizona v. Rumsey, 467 U.S. 203, 212 (1984); Planned Parenthood v. Casey, __U.S.__, __, 112 S.Ct. 2791, 2808-2809, 120 L.Ed.2d 674 (1992); Payne v. Tennessee, 501 U.S. _ , __, 111 S.Ct. 2597, 2617-2618, 115 L.Ed.2d (1991); Welch v. Texas Dept. of Highways and Public Transportation, 483 U. S. 468, 479 (1987).

[2]Because this case involves issues of constitutional jurisprudence, this factor will not be addressed.

parameters of federal attempts to remedy discriminatory practices and the monument as to the limits on race conscious relief. Compare City of Richmond v. J.A. Croson, Co., 488 U.S. 469, 490 (1989); Harrison & Burrowes Bridge Constructors v. Cuomo, 981 F.2d 50, 56-58 (2d Cir. 1992). It has been that guidepost for fourteen and one half years, and it has been the basis for innumerable attempts to address problems of minority underrepresentation. The decision in Fullilove certainly was not a casual or incidental holding. Furthermore, there has been an enormous opportunity to reject the holding in this decision, yet there have been no steps taken in that direction until the granting of this Petition for a Writ of Certiorari. See, e.g., Ellis v. Skinner, 961 F.2d 912 (10th Cir.), cert. denied, *sub nom.* Ellis v. Card, ___ U.S. ___, 113 S.Ct. 374, 121 L.Ed. 2d 286 (1992); Milwaukee County Pavers Ass'n v. Fiedler, 922 F.2d 419 (7th Cir.), cert. denied, 501 U.S. ___, 111 S.Ct. 2261, 114 L.Ed.2d 714 (1991).

Similarly, Metro was decided four years ago and Fullilove provided a large part of the doctrinal basis for the decision. Thus, there is nothing in *either* Fullilove or Metro that would allow one to opine that ether decision should be wrenched from its position of bedrock law allowing Congress to attempt to remedy a rather egregious portion of our history and its mournful legacy.

B. Overruling Fullilove or Metro Would Frustrate The Considerable Legitimate Reliance on These Cases.

As discussed above, Fullilove has provided the basis for a number of statutory provisions allowing for the inclusion of minority contractors. These cases have provided the jurisprudential framework for assessing the constitutionality of comparable congressional attempts to address the underutilization of minority ability, initiative, and hard work; as well as to off-set the pervasiveness of discrimination and incomplete opportunities.

Any cursory check of Shepard's or the data bases of Lexis or Westlaw will disclose the incredible degree to which the lower courts have relied on this Court's opinion in Fullilove, and the

impact of this case before these courts and Congress.[3] *Stare decisis* protects such settled expectations. Vasquez v. Hillery, supra.

C. There Has Been No Indication That Fullilove and Metro Have Been Ineffective.

Additionally, there has been no indication that Fullilove and Metro have been ineffective or "unworkable" decisions.[4] Indeed, as section III of this brief, *infra* demonstrates, these programs and their progeny have been quite effective. Furthermore, Congress has continued to support these type of programs.

Thus, it is beyond cavil that there had been no evidencing of a lack of effectiveness or "unworkable" areas in Fullilove and Metro that would call for the overruling of these precedents.

D. There Has Been No Showing That There Is Some Necessity To Bring Fullilove and Metro Into Agreement With Experience Or Newly Ascertained Facts.

There has been no showing that the decision in either Fullilove and Metro is at odds with judicial or legislative experience. Indeed, as established in section III, *infra*, these cases have been shown to be the foundation for the most successful means of remedying some of the problems facing certain segments

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[3]Since Fullilove, Congress has enacted other minority set-aside provisions, e.g., Highway Improvement Act of 1982, Pub. L. No. 97-424, § 105(f), 96 Stat. 2097, 2100 (1987); International Security and Development Assistance Authorization Act of 1983, Pub. L. No. 98-151, 97 Stat. 964, 970-71 (1983).

[4]Although these decisions may have engendered opposition, this in no way indicates that they are "unworkable". Opposition and unpopularity do not necessarily call for reversal or even review. See Brown v. Board of Education, 349 U.S. 294, 299-301 (1955); Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 546 (1985); Planned Parenthood v. Casey, ___ U.S. ___, 112 S.Ct. 2791, 2809, 120 L.Ed.2d 674 (1992).

of our society.

Thus, there is no reason for this Court to overrule either of these decisions.

II. THIS LEGISLATION IS A VALID EXERCISE OF CONGRESSIONAL POWER UNDER THE ENFORCEMENT PROVISIONS OF THE THIRTEENTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The enforcement clauses of the Civil War Amendments grant Congress broad power to address racial inequities in this country. Indeed, it is established that these amendments impose upon Congress the responsibility to do so: "Congress properly may – and indeed must – address directly the problems of discrimination in our society." Fullilove at 499 (Powell, J., concurring).

As discussed below, when Congress acts under the enforcement clauses it employs the broadest remedial power of any governmental organ. The well-established need for judicial deference to the decisions of Congress is correspondingly strongest in this context. The legislation at issue in this case is a valid exercise of congressional power under the enforcement clauses of the Thirteenth and Fourteenth Amendments; to overturn it would be to infringe upon Congress's constitutionally mandated role.

A. The Enforcement Clauses of the Civil War Amendments Grant Broad Power to Congress and Require Unusually Strong Judicial Deference.

The Thirteenth, Fourteenth, and Fifteenth Amendments to the United States Constitution were enacted in rapid succession with a common goal: "the construction of a penumbra of legal commands ... designed to raise the race of freedmen from the status of inferior beings – a status imposed by the system of chattel slavery – to that of free men and women, equal participants in the hitherto white political community consisting of the 'people

of the United States'."[5] This court has referred to "freedom of the slave race ... and protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised dominion over him" as the "pervading purpose" found in these three amendments. Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 71 (1872). Central to the fulfillment of this common purpose is each amendment's explicit grant of authority to Congress to enforce the amendment's guarantees through legislation.[6]

For more than a century, the Supreme Court has consistently held that the enforcement provisions constitute broad grants of power to Congress to fulfill the purposes of the Civil War Amendments.[7] The Civil War Amendments have long been understood as effecting a dramatic power shift: the amendments broadly expanded the power of the federal government, while severely limiting the power of the states. See Ex Parte Virginia,

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[5]A. Kinoy, The Constitutional Right of Negro Freedom, 21 Rutgers Law Review 387, 389 (1967).

[6]Amendment XIII, Section Two provides:

> Congress shall have power to enforce this article by appropriate legislation.

Amendment XIV, Section Five provides:

> The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Amendment XV, Section Two provides:

> The Congress shall have power to enforce this article by appropriate legislation.

[7]See, e.g., Ex Parte Virginia, 100 U.S. 339 (1879) (the enforcement provisions as a group); Katzenbach v. Morgan, 384 U.S. 641 (1966) (section 5 of the Fourteenth Amendment); Fullilove, supra (section 5 of the Fourteenth Amendment (Burger, C.J., joined by White, J. and Powell, J., plurality opinion)); Id. at 500-01 (Powell, J., concurring); City of Richmond v. Croson, supra at 488-89 (1989) (section 5 of the Fourteenth Amendment (O'Connor, J., joined by Rehnquist, C.J. and White, J., plurality opinion)); South Carolina v. Katzenbach, 383 U.S. 641 (1966) (section 2 of the Fifteenth Amendment); Jones v. Mayer, 392 U.S. 409 (1968) (section 2 of the Thirteenth Amendment); Runyon v. McCrary, 427 U.S. 160 (1976) (section 2 of the Thirteenth Amendment).

100 U.S. 339, 345 (1879) (the Civil War Amendments were designed "to be ... limitations on the power of the states and enlargements of the power of Congress."); City of Richmond v. J.A. Croson, supra at 521-22 (1989) (Scalia, J., concurring). These enlargements of the power of Congress authorize the legislation at issue here, and require unusual judicial deference to congressional judgments about ends and means in the exercise of this power.

This Court traditionally is highly deferential when passing on the validity of any act of Congress, even when constitutional values are at issue. Justice Holmes referred to constitutionality review of acts of the national legislative branch as "the gravest and most delicate duty that this Court is called on to perform." Blodgett v. Holden, 275 U.S. 142, 148 (1927) (Holmes, J., joined by Brandeis, J., Sanford, J., and Stone, J., concurring).[8] Unlike when this Court is reviewing the acts of a state or local political body, in this context a finding of unconstitutionality by the Supreme Court would upset final action taken by co-equal branches of government. Congressional legislation such as the Small Business Act and the Surface Transportation Assistance Act is the considered judgment of both houses of Congress, and has been approved by the President – thus the long history of judicial deference and the presumption of constitutionality is appropriate in

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[8]See also Columbia Broadcasting Sys., Inc. v. Democratic Nat. Com., 421 U.S. 94, 102 (1973) (in evaluating First Amendment claim, Supreme Court "must afford great weight to the decisions of Congress."); Rostker v. Goldberg, 453 U.S. 57, 64 (1981) (quoting with approval Blodgett and C.B.S.); United States v. National Dairy Products Corp., 372 U.S. 29, 32 (1963) ("strong presumptive validity ... attaches to an Act of Congress"); Walters v. National Association of Radiation Survivors, 468 U.S. 1323, 1324 (1984) ("[P]resumption of constitutionality ... attaches to every Act of Congress" (Rehnquist, J., as Circuit Justice)); Fullilove, supra at 472 (quoting Blodgett with approval); Morrison v. Olson, 487 U.S. 654, 704 (1988) ("Where a private citizen challenges action of the Government ... harmonious functioning of the system demands that we ordinarily give some deference, or a presumption of validity, to the actions of the political branches ...." (Scalia, J., dissenting)).

this instance.[9]

This traditional deference is even greater when Congress acts in the area of race relations; here the Civil War Amendments' enforcement provisions give Congress special authority to act, above and beyond its normal powers. "These are of course not the only sources of congressional power to enact civil rights laws .... But the post-Civil War additions, unlike the original grants, were born of a special concern with racial discrimination; and the civil rights powers they confer are potentially the most far-reaching." G. Gunther, Constitutional Law, Twelfth edition, 878-79 (1991). See also Oregon v. Mitchell, 400 U.S. 112, 129 (1970) ("Where Congress attempts to remedy racial discrimination under its enforcement powers, its authority is enhanced by the avowed intention of the framers of the Thirteenth, Fourteenth, and Fifteenth Amendments." (Black, J.)).

As such, judicial scrutiny of congressional action in the area of race relations is correspondingly more limited than in other contexts. Justice O'Connor has noted that "Congress has considerable latitude, presenting *special concerns for judicial review*, when it exercises its 'unique remedial powers ... under § 5 of the Fourteenth Amendment." Metro at 3030, quoting Croson at 488 (emphasis added). This Court's posture when reviewing congressional acts in the area of race relations is akin to its stance in another area of special deference: review of congressional actions relating to the military. See, e.g., Rostker v. Goldberg, 453 U.S. 57, 68 (1981) ("In deciding the question before us we must be particularly careful not to substitute our judgment of what is desirable for that of Congress, or our own evaluation of evidence for a reasonable evaluation of the legislative branch.").

Congress needs wide rein with which to further this overriding interest; judicial scrutiny is correspondingly narrower. The Court should keep these concerns in mind when it undertakes its review of congressional action in this case.

B. The Legislation at Issue in this Case is a Valid Exercise of Congressional Power Under the Thirteenth Amendment.

The Thirteenth Amendment abolished slavery in this country.[10] Of course, Congress's areas of authority under the enforcement provision of the Thirteenth Amendment "extend far beyond the actual imposition of slavery or involuntary servitude." Griffin v. Breckenridge, 403 U.S. 88, 105 (1971). Since the Civil Rights Cases, supra, it has been clear that Congress has the power to pass legislation to eradicate all "badges and incidents of slavery ...." Id. at 20. It is Congress, not any court, that makes the final determination as to what constitutes a badge or incident of slavery; this determination is subject only to rationality review by courts. "[C]ongress has the power under the Thirteenth Amendment rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation." Jones v. Mayer, 392 U.S. 409, 440 (1968); Griffin, supra at 105. The Mayer court went on to uphold the

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[9]In addition, this Court has repeatedly held that Congress has broad power under the Spending Clause to distribute funds as it sees fit. Again, judicial deference is called for: "The discretion [in exercise of the spending power] ... is not confided in the courts. The discretion belongs to Congress, unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment. This is familiar law." Helvering v. Davis, 301 U.S. 619, 640 (1937). Congress's choices may only be overturned by the courts if "by no reasonable possibility can the challenged legislation fall within the wide range of discretion permitted to Congress." Id. at 644.

Congress is also vested with a special responsibility in spending matters to ensure that its money does not contribute to the perpetuation of racial inequities. "Simple justice requires that public funds, to which all taxpayers of all races contribute, not be spent in any fashion which encourages, entrenches, subsidizes, or results in racial discrimination." Lau v. Nichols, 414 U.S. 563, 569 (1974). This Court has long recognized the strong governmental interest in ensuring that state funds do not support racial discrimination, public or private. See, e.g., Norwood v. Harrison, 413 U.S. 455 (1973); Gilmore v. City of Montgomery, Alabama, 417 U.S. 556 (1974).

[10]"Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." United States Constitution, Amendment XIII, Section One.

congressional legislation at issue after applying a rational-basis test: "Nor can we say that the determination Congress has made is an irrational one." Mayer at 441.

Congress could rationally have decided that dispensation of government funds was an appropriate area for exercise of its Thirteenth Amendment powers. Government action such as contract awards possesses strong symbolic value: even decisions that are small in dollar amount carry the state's imprimatur. Systematic underutilization of available disadvantaged business -- usually minorities and women -- sends a destructive and hurtful message, one that resonates with the history of societal devaluation that the Civil War Amendments were aimed at eradicating. Congress could rationally have concluded that it didn't want this message sent, and employed its Thirteenth Amendment power to ensure that it wouldn't be.[11]

Of course, it is axiomatic that there is no state action requirement for Congress to act under the Thirteenth Amendment; the amendment's prohibition of slavery obviously applies to private individuals. If Congress, using its section 2 power, can right the wrongs of -- and exert control over -- purely private individuals (as it did with Supreme Court approval in Mayer, supra, Griffin, supra, and Runyon v. McCrary, 427 U.S. 160 (1976), it must necessarily be able to do the same with regard to federal and state agencies. Here, Congress has taken steps to ensure that these agencies fairly utilize disadvantaged businesses. Thus, this statute is clearly valid as an exercise of the broad grant of authority conferred by section 2 of the Thirteenth Amendment.

[11]Note that Congress need not explicitly state in the legislation at issue that it is acting under its Civil War Amendment enforcement powers. See EEOC v. Wyoming, 460 U.S. 226, 243 (1983) (Congress need not "recite the words 'section 5' or 'Fourteenth Amendment' or 'equal protection'" in order to utilize its section 5 powers). This comports with general principles of court review of congressional legislation: "The ... constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise." Woods v. Lloyd W. Miller Co., 333 U.S 138, 144 (1948).

C. The Legislation at Issue in this Case is a Valid Exercise of Congressional Power Under the Fourteenth Amendment.

Similar to section 2 of the Thirteenth Amendment, section 5 of the Fourteenth Amendment is a broad grant of power, conferring upon Congress wide discretion to determine both which areas require attention in order to fulfill the promise of the Fourteenth Amendment, and the best means by which to proceed. "Correctly viewed, § 5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment." Katzenbach v. Morgan, 384 U.S. 641, 651 (1966). This statement of broad congressional power was reaffirmed in Fullilove, supra at (Burger, C.J., joined by White, J. and Powell, J., plurality opinion), and in City of Richmond v. Croson, supra at 490 (O'Connor, J., joined by Rehnquist, C.J. and White, J., plurality opinion).

In exercising its section 5 power, Congress is not bound by judicial determinations as to what constitutes an equal protection violation. Katzenbach, supra at 648.[12] As with the Thirteenth Amendment, Congress is free to make its own determinations as to which areas need its attention in order to fulfill the promise of the Fourteenth Amendment. In rejecting arguments to the contrary, this Court has stated:

> A construction of § 5 that would require a judicial determination [of a prior Fourteenth Amendment violation] as a condition of sustaining the congressional enactment, would depreciate both

[12]Accord, Croson, supra at 490 ("The power to 'enforce' [the dictates of the Fourteenth Amendment] may at times also include the power to define situations which *Congress* determines threaten principles of equality ...." (O'Connor, J., joined by Rehnquist, C.J. and White, J., plurality opinion; emphasis in original)) and Fullilove, supra, at 502 ("It is beyond question ... that Congress has the authority to identify unlawful discriminatory practices, to prohibit those practices, and to prescribe remedies to eradicate their continuing effects." (Powell, J., concurring)).

> congressional resourcefulness and congressional responsibility for implementing the amendment. It would confine the legislative power in this context to [an] insignificant role ....

Katzenbach, supra at 648.

As with the Thirteenth Amendment, courts review Congress's determinations of this nature under a highly deferential standard, akin to rationality review. "It was for Congress ... to assess and weigh the various conflicting considerations .... It is not for us to review the congressional resolution .... It is enough that we be able to perceive a basis upon which the Congress might resolve the conflict as it did." Katzenbach, supra at 653.

Congress's affirmative power under the Fourteenth Amendment parallels that granted by section 2 of the Fifteenth Amendment, an analogous enforcement provision.[13] In City of Rome v. United States, 446 U.S. 156, 177 (1980), this Court upheld congressional action under section 2 of the Fifteenth Amendment that was not aimed at remedying past violations of section 1. Id. at 177. Similarly, under section 5 of the Fourteenth Amendment, Congress doesn't have to wait for a violation of the Amendment's other provisions in order to act; the enforcement clause grants power to take proactive steps to further the amendment's goals. This comports with the original understanding of the Republican dominated Congress that drafted and ratified the Fourteenth Amendment, as demonstrated by their passage of the various Freedmen's Bureau Acts, providing affirmative aid to ex-

[13]It is important to note that there is *no* state action requirement for congress to act under its section 5 power. Congress's role in furthering the aims of the Fourteenth Amendment is not dependent on the behavior of states and localities. On the contrary, section 5 grants Congress the power to take *affirmative steps* to advance the Amendment's goals. Congressional power under section 5 "may at times also include the power ... to adopt prophylactic rules to deal with [situations in which the 'principles of equality' are threatened]." Croson, supra at 490, (O'Connor, J., joined by Rehnquist, C.J. and White, J., plurality opinion (citing with approval Katzenbach, supra at 651)).

slaves.[14]

Congress could rationally have determined that government contracting, with its well-documented history of underutilization of available disadvantaged businesses, was a situation that required attention in order to advance the goals of the Fourteenth Amendment. As noted above, Congress need not explicitly note the source of its power in order to utilize the various enabling clauses of the Constitution. See § II, B, *Ante*.

Even if there were a state action requirement, it would be met in this instance because over eighty percent of the funds that reach private individuals under this legislative program first go through state governments. See, e.g., the application of STAA and STURAA[15] at issue in Ellis v. Skinner, supra (State of Utah, as a condition of receipt of federal highway funds, complied with the DBE program established by STAA and renewed by STURAA).

Although no state received or distributed federal funds in petitioners' scenario -- funds went through CFLHD directly to Mountain Gravel & Construction Company -- such a situation is the exception rather than the rule under this program. However, petitioners have challenged this statute as a whole. The role of State agencies in acting as a conduit for federal funds, and in making the final contracting decisions in most cases, clearly establishes a level of involvement that would satisfy a state action requirement. Therefore, this legislation is fully authorized under Congress's section 5 powers, and thus calls for a highly deferential posture upon judicial review.

[14]See Brief of the NAACP Legal Defense and Educational Fund, Inc., as *Amicus Curiae*, 10-53, in Regents of the University of California v. Bakke, 438 U.S. 265 (1978) (No. 76-811, October Term, 1976).

[15]The Surface Transportation Assistance Act of 1982, Pub.L. No. 97-424, § 105(f), 96 Stat. 2097 (STAA), and the Surface Transportation and Uniform Relocation Assistance Act of 1987, Pub.L. No. 100-17, § 106(c), 101 Stat. 132, 145 (STURAA).

D. Congress Has Chosen a Permissible Means With Which to Act Under the Enforcement Clauses of the Civil War Amendments.

Congress has wide discretion as to the means to be employed in remedying the effects of past discrimination, and in enacting prophylactic measures to prevent future discrimination. Almost half a century ago, this Court pointed out that "[i]n no matter should we pay more deference to the opinion of Congress than in its choice of instrumentalities to perform a function that is within its power." National Mutual Insurance Co. v. Tidewater Transfer Co., 337 U.S. 582, 603 (1949) (Jackson, J., joined by Black, J., and Burton, J., plurality opinion). As discussed above, judicial deference to congressional choices is particularly appropriate when Congress is utilizing its broad grants of power under the enforcement clauses of the Civil War Amendments.[16]

There is a natural tension between the well-established deference to congressional choices described above and the need to scrutinize Congress for equal protection violations. In Metro, supra, this Court resolved that tension by applying intermediate scrutiny to non-remedial congressional action that classified on the basis of race. Metro at 3008. The factors arguing for relaxed scrutiny are even stronger here than they were in Metro.

First, this program benefits disadvantaged businesses, whether or not the disadvantaged business is woman- or minority-owned. The Court-approved program in Metro, by comparison, disbursed governmental benefits on race-based lines. Second, the legislation at issue in this case is authorized by the enforcement clauses of the Thirteenth and Fourteenth Amendments, as discussed above. The enforcement clauses give Congress much greater power than that of the states as to choice of means with which to remedy discrimination. Hampton v. Mow Sun Wong, 426 U.S. 88, 100 (1976) ("[O]verriding national interests ... may justify

[16]See Metro, supra at 3030: "Congress has considerable latitude, presenting special concerns for judicial review, when it exercises its 'unique remedial powers ... under § 5 of the Fourteenth Amendment." (O'Connor, J., joined by Rehnquist, C.J. and White, J., plurality opinion (quoting Croson, supra, at 488)).

selective legislation that would be unacceptable for an individual state.").

Validity as an exercise of enforcement clause power sets the statutes apart from the program at issue in Metro; the lack of a section 5 justification for the Metro program was a key component of Justice O'Connor's dissent. See Metro at 3030-31. These two points about the legislation involved here -- its race-neutrality at the contract-distribution level and its status as an exercise of enforcement clause power -- make Congress's choice of means much less controversial than the Court-approved choice in Metro.[17]

The extra latitude granted Congress by the enforcement clauses can, in some circumstances, authorize even race-conscious congressional measures. "[W]e reject the contention that in the remedial context the Congress must act in a wholly 'color-blind' matter." Fullilove, supra at 482. Furthermore, this Court has approved race-conscious remedial measures taken by both federal courts and states,[18] and "[i]t is fundamental that in no organ of government, state or federal, does there repose a more comprehensive remedial power than in the Congress, expressly charged by the Constitution with competence and authority to enforce equal protection guarantees." Fullilove at 484.

In addition, the Republican dominated Congress that originally ratified the Fourteenth Amendment had no notion that it would prohibit affirmative, race-based congressional action. The

[17]Note also that, as those challenging the Fullilove program pointed out, the case for constitutionality of the Small Business Act is stronger than that for Fullilove's program, which of course also received Supreme Court approval. See Petitioners' brief in Fullilove, characterizing Small Business Act section 8(d) as "racially neutral," and noting that "Congress has removed from the amendment to the Small Business Act the two unconstitutional thorns in the [legislation at issue in Fullilove]."

[18]See, e.g., Swann v. Charlotte-Mecklenburg Bd. of Education, 402 U.S. 1 (1971) (upholding court injunction requiring school board to use racial classifications in desegregating school system); United Jewish Organizations v. Carey, 430 U.S. 144 (1977) (upholding race-conscious state legislative redistricting plan).

Thirty-ninth Congress passed the 1866 Freedmen's Bureau Act,[19] a comprehensive and explicitly race-conscious measure, less than a month after their approval of the Fourteenth Amendment.[20] Of course, this Court in Metro approved a congressional race-conscious measure even without the mitigating factors of (1) employment of the enforcement clauses, and (2) a remedial aim. The non-race-conscious measure at issue in this case is clearly a legitimate means for Congress to exercise its broad power under the enforcement clauses.

III. WITHOUT MINORITY BUSINESS ENTERPRISE PROGRAMS AS EMBODIED IN THE SURFACE TRANSPORTATION ASSISTANCE ACT OF 1982 AND THE SMALL BUSINESS ACT, MBEs WOULD CONTINUE TO OPERATE AT A DISADVANTAGE.

Minority Business Enterprise (MBE) programs have had a significant positive impact on the ability of minority owned businesses to survive and, sometimes, to thrive in today's economy. Without these programs, many MBEs would be unable to compete, thereby perpetuating the economic disadvantage experienced in minority communities. Experience and logic demonstrate that barriers still exist which exclude MBEs from contracting opportunities available to similarly situated non-minority businesses. As a result, MBEs remain underutilized as government contractors. This, in turn, reduces competition in the marketplace.

An examination of programs which have been in effect shows not only that they have been effective in raising minority participation in contracting opportunities, but that race neutral policies intended to eliminate discriminatory barriers are insufficient to remedy the inequality faced by MBEs.

Existing MBE programs have been a positive social

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[19]14 Stat., c. 200, at 173-177 (1866).

[20]See Brief of the NAACP Legal Defense and Educational Fund, Inc., as *Amicus Curiae*, 10-53, in Regents of the University of California v. Bakke, supra (No. 76-811, October 1976 Term).

development: they raise minority employment and open up opportunities previously denied to a large sector of society because of race or ethnicity. The SBA program (15 U.S.C. § 644(g)) adopted by Congress as implemented by the Federal Lands Highway Program Transportation through the subcontracting compensation clause program, is a desirable, appropriate, cost-effective, constitutional, and necessary method to remedy discrimination against MBEs.

A. Barriers To Equality In Contracting Continue To Exist.

Despite efforts to eliminate discrimination in this country, MBEs continue to be disadvantaged as compared to non-minority contractors in obtaining contracting opportunities. Existence of laws and regulations outlawing discrimination have not yet leveled the playing field.

Below, several utilization studies commissioned by public entities in the San Francisco Bay Area and across the country following this Court's decision in City of Richmond v. J.A. Croson Co., supra are examined.[21] These studies review governmental contracting awards to assess the need for MBE programs. Among other things, the studies examine the

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[21]National Economic Research Associates, Inc., The Utilization of Minority and Woman-Owned Business Enterprises by the San Francisco Redevelopment Agency (April, 1993); National Economic Research Associates, Inc., The Utilization of Minority and Woman-Owned Business Enterprises by the City Of Hayward (March, 1993); National Economic Research Associates, Inc., The Utilization of Minority and Women-Owned Business Enterprises by Contra Costa County (May, 1992); BPA Economics, Mason Tillman Associates, et al., MBE/WBE Disparity Study for the City of San Jose (1990); Massachusetts Commission Against Discrimination, Public Hearings on M/WBEs: Report, Findings and Recommendations (Dec. 1990); Brimmer and Marshall, Atlanta Disparity Study, (1990); Conta and Associates, Milwaukee Metropolitan Sewerage District Disparity Study (1990); and MGT of American, Inc., City of Tallahassee MBE Disparity Fact-Finding Study, Final Report (1990). For the most part, this brief focuses only on the construction contracting aspect of these studies because the program before this Court concerns construction contracting.

availability of minority contractors and the utilization rates of minority contractors. They then compare availability of contractors with the utilization of those contractors to determine whether they are receiving the expected percentage of available contracts. This method demonstrates whether or not minorities are underutilized as compared to their availability. These studies uniformly conclude that barriers still prevent minority-owned business enterprises from obtaining their expected share of government contracts.

In addition to statistical analyses, these studies typically include anecdotal evidence regarding MBEs' contracting experiences. The public entities hold public hearings, conduct personal interviews, survey MBEs in the appropriate geographic area, review case filings and court decisions involving discrimination claims, review the academic literature on discrimination, review reports prepared by and for government agencies on discrimination, and review newspapers for accounts of discrimination in the Bay Area and elsewhere. Every study showed that discrimination continues to prevent minorities from competing on an equal footing with non-minorities.

For example, in Hayward large numbers of construction MBEs reported experiencing discrimination in the following areas: applying for commercial loans, applying for a bond, applying for commercial insurance, attempting to hire workers from union hiring halls, obtaining quotes from suppliers, receiving requests for bids, applying for membership in trade associations, and other dealings with trade associations. Hayward Study, Table 6.6.

Similar findings were true in Atlanta where the study concluded that Atlanta's "minority entrepreneurs have a lower success rate in obtaining loans and bonding and procuring contracts regardless of their levels of education, training, and business-related experience." M.F. Rice, Justifying State and Local Government Set-Aside Programs Through Disparity Studies in the Post Croson Era, Vol. 52, No. 5, Public Administration Review (September/October 1992) at 486. The study also found "marketplace discrimination in bidding opportunities and bonding, bid manipulation, price discrimination by suppliers, customer/end user discrimination, discrimination in financing and stereotypical attitudes of customer and professional buyers." Id.

This underutilization of MBEs cannot be separated from

race discrimination. For instance, the San Francisco Redevelopment Agency (SFRA) study found that a sizable proportion (approximately 60%) of M/WBE construction firms which responded to its survey had experienced at least one instance of discrimination in the course of business dealings in the last five years. Reported discrimination was particularly high for African-American business owners, eighty-one percent of whom reported they had experienced discrimination during the previous five years. SFRA Study at xi.

MBEs' reports that they continue to face significant barriers and discrimination in contracting is borne out in a study conducted by Timothy Bates of the Woodrow Wilson Center. T. Bates, Assessment of the New Jersey, New York City Area Small Business Construction Section (October 1993). This study compared non-minority and minority construction business owners with similar educational attainment and years in business. The study establishes that "[t]he non-minority owners who failed to finish high school . . . are much more successful at finding work than their minority cohorts . . . [and] are much larger and more likely to stay in business than those headed by minorities lacking high school degrees." The report suggests that the reason for this differential is that "non-minorities have preferential access to work; they are the in-group while minorities are the out-group." Id. at v-vi.

Furthermore, when looking at non-minority and minority firms and length of time in business -- a factor which can predict success:

> non-minority start-ups in construction face less of a lag than minorities in generating substantial revenues: firms in business for a year or two show a particular advantage over minority firms of the same age. Once again, it appears that non-minorities entering construction self-employment often have immediate access to the networks that provide them with work, while minority firms must build up these contacts with networks gradually during their early years of operation. Many MBEs never survive the slow start-up phase."

Id.

Moreover, evidence of continuing barriers against MBEs in the absence of affirmative action programs has been demonstrated in the studies analyzed in this brief. MBEs consistently report that their only subcontracting opportunities come with government programs requiring affirmative action. The San Francisco Redevelopment Agency reported that over 75% of the 95 M/WBE construction firm owners who responded to its surveys indicated that prime contractors that use their firms to meet M/WBE requirements on public-sector projects, seldom or never use their firms on projects that do not have M/WBE requirements. SFRA at x. Moreover, in Hayward, California, the study found that approximately 50% of the survey respondents are seldom or never used by prime contractors for projects that do not have M/WBE goal requirements. Hayward Report, Table 6.5 An even higher percentage of those surveyed in the Contra Costa County study reported that they were not used on projects without MBE requirements. Sixty-two percent reported they were never used on projects without MBE requirements and an additional 23% reported they were only used infrequently. Table 6.4 at 219. Similarly, in Milwaukee, Wisconsin the study found that approximately 75 percent of black-owned businesses and 32 percent of Hispanic-owned businesses affirmed the existence of racially motivated obstacles within the Milwaukee construction marketplace. M.F. Rice, Id. at 486. These findings establish that without affirmative action programs many MBEs would find it extremely difficult to survive.

B. Minority Businesses Are Underutilized In The Absence of Programs Designed To Increase Their Participation.

After Croson was decided, many public entities suspended their MBE programs in the absence of a disparity study. In these jurisdictions, minority contracting plummeted. In North Carolina, for example, MBEs' share of state Department of Transportation contracts fell by more than half to 2.9% from their previous share of about 7.2% of the total dollar value of the contracts awarded. Contract Awards Slump After State Eases Goals, Engineering News Record, Vol. 228, No. 2 at p.25.

The pattern demonstrated in the Hayward Study is typical

of other local governments. An examination of the City's 316 construction projects under $100,000 during the relevant time frame showed that MBEs had been underutilized at a statistically significant level. Significantly, no MBE group received more than 31% of their expected share of construction projects. Hayward Study at 5-14. Furthermore, overall MBE utilization on subcontracts when its MBE program was not operating was below overall MBE availability, indicating underutilization.[22] Id. at 5-14 - 5-15.

The same underutilization problem was found in Contra Costa County, California where MBE prime and subcontractors were underutilized by the county. Contra Costa County Report at xii, Table A. African Americans' prime contractors received no contracts, Asians received 39% of the contracting dollars compared to their availability and Hispanics received 78% of their expected contracting dollars. Id. The same pattern held true for African American and Hispanic subcontractors which received 32% and 69% of the expected dollars, although Asians received 3 times the expected amount.[23] Id. However, once the County established goals, minority utilization of both prime contractors and subcontractors increased. Contra Costa County Study at 148-149.

Similar results were found for San Jose, California as well. Before an MBE program was initiated, the difference between the actual and the expected number of contracts was statistically significant for both prime contractors and subcontractors. San Jose Report, Vol. 1 at III-2.[24] After the program was in place, the

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[22]Insufficient data was available to conduct a disparity test for large construction contracts. Hayward Report at 5-14.

[23]The authors propose as an explanation that Asian construction subcontractors did well because one or two firms received large subcontracts. Contra Costa County Report.

[24]The City's study demonstrates a significant increase in MBE participation on its contracts in 1987-89 when an MBE program was in place over the years 1981-82 prior to the institution of an MBE program. San Jose Study, Vol. 1 at III-3. It should be noted that despite the increase in minority participation, statistically significant under-utilization of MBEs remained despite the existence of an MBE program.

number of minority contractors participating on City construction projects dramatically increased. However, evidence of underutilization remained. Id., Vol. 1 at III-15-16.

These findings were echoed in the Tallahassee, Florida study which determined that for the years 1973 to 1975 no minority construction contractors received city contracts. In 1976, minority construction firms' share of the contracts remained at less than one percent of the total contracts. In fact, contract awards to minority construction firms did not exceed one percent until 1982 when the amount awarded was 1.25 percent. The best year for contracts awards to MBEs was 1987 when a total of prime and subcontractor awards totalled approximately 24 percent. Id. at 486-87.

The experience in Boston, Massachusetts also attests to the need for affirmative action programs designed to increase minority participation in government contracting where a program was in effect during the 1980s. According to census population statistics from 1980, African-Americans in the construction industry were underrepresented at a rate of 40 percent. Five years later, in the 1985-87 period, underrepresentation of African-Americans had declined to 30%. City of Boston Study of Minority and Women Business Enterprises, 1993 at 190-191. It appears that most, if not all, of the increased opportunity came through contracts in the public sector as a result of state affirmative action programs. In Boston, minority firms represented less than one percent of the professional and contracting firms employed in the private sector in the same period. Id. at 191. This is true in all the utilization studies examined herein.

Furthermore, even where preference programs are in place, white males continue to receive the lion's share of public contracts. Thus in San Francisco, California, in 1991-92, MBEs received only 7.3 percent of the City's contract money, an increase of almost one percent over the previous year. S. Oring, City Contracts Up 41% for Women, Minorities, San Francisco Business Times (January 8, 1993).

C. Race-Neutral Efforts To Provide Minority Businesses a Fair Share of Government Contracts Have Proven Insufficient.

Utilization studies typically examine race-neutral attempts to eliminate discrimination against MBEs to determine whether a race-conscious program is necessary. These studies universally reject race-neutral means as sufficient, standing alone, to create equality between minority and non-minority contractors.

The City of San Jose provides a striking example. The City had a race-neutral small business program in effect for the entire period covered by its study. The report concluded that

> The fact that statistically significant disparities were found while these programs were in effect strongly suggests that race-neutral methods alone have provided, at best, an inadequate means of addressing problems associated with discriminatory practices against minority and female construction contractors.

City of San Jose Study, Vol. 1 at III-4. The same conclusion was reached in the City of Hayward Study where a variety of race-neutral activities and programs to encourage small business participation had been undertaken. Activities included outreach efforts, improved contracting and procurement practices and education. The study concluded: "Race-neutral measures have not succeeded in Hayward and there is limited evidence that they have worked elsewhere." Hayward Study at xv.

D. Implementation of Race-Conscious Contracting Programs Has Proven to Be Good Public Policy, as Increased MBE Participation in Government Contracting Results in an Increase in Minority Employment.

It hardly needs saying that unemployment in minority communities is extremely high, much higher than the rate in non-minority communities. MBE programs impact this endemic problem because they tend to hire a larger proportion of minorities than do non-minority-owned businesses. In fact, most of the workers employed by black-owned businesses are minorities. T. Bates, Do Black-Owned Businesses Employ Minority Workers? New Evidence, Review of Black Political Economy (Spring 1988)

at 51. The pattern is the same regardless of the size of the firms and is true for the construction industry as well as others. Id. "While 61.2 percent of the non-minority business universe (excluding firms with no employees) has no minority employees, black employers with no minority employees make up only 4.6 percent of the corresponding black universe." Id. at 52. In fact, a large majority of black-owned firms (86 percent) rely on minority workers to fill over 50 percent of their employee needs. Thus by increasing contracting opportunities for MBEs, government also increases job opportunities for the segment of society with the highest rate of unemployment. Furthermore, expanded MBE programs have a multiplier effect, increasing the pool of available minorities as business owners. "Growth of minority firms "has the potential to offer expanded work experience in the construction industry to younger minority employees. These individuals, in turn, will be the next generation of minority construction firm owners." Id. at 64.

IV. SECTION 502 OF THE SMALL BUSINESS ACT IS A CONSTITUTIONAL DELEGATION OF CONGRESSIONAL AUTHORITY.

The United States Constitution authorizes Congress to "provide for the ... general Welfare of the United States" and "to enforce, by appropriate legislation," the equal protection guarantees of the Fourteenth Amendment. U.S. Const. art. I, Section 8, cl.1; amdt. 14, Section 5. By enacting the Small Business Act (SBA), Congress merely exercised these powers. Section 502 of the SBA, 15 U.S.C. § 644 (g), provides the statutory authorization for the President and federal agencies to establish utilization goals for disadvantaged small businesses. The SBA furnishes specific guidelines for the President and federal agencies, including the Federal Lands Highway Program (FLHP), to follow and ensures ongoing congressional oversight through a mandatory, detailed reporting system to Congress.[25]

[25]The detailed reporting requirements of SBA Sections 644 (h)(1) and (2) require each federal agency's annual report to Congress to include: the agency's goals and performance in attaining the goals; an analysis of any failure to achieve the Government-wide goals or individual agency goals; actions planned by the agency with respect to goals in the succeeding fiscal year; the number and dollar value of contracts awarded to small business concerns and small business concerns owned and controlled by socially and economically disadvantaged individuals; and the number and dollar value of subcontracts awarded to small business concerns and small business concerns owned and controlled by socially and economically disadvantaged individuals.

Because Congress had the authority to enact the SBA and because the legislation contains inherent safeguards, the SBA is a permissible delegation of Congress' authority to establish utilization goals for disadvantaged small businesses. "If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power." J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 406, 409 (1928).[26]

A. The Cost to the Federal Government of Undertaking Utilization Studies Throughout the Country Would be Prohibitive.

All the studies cited in this brief are well over 200 pages. They include complicated statistical analyses and extensive fact gathering, including holding hearings, conducting surveys, and research. The cost of each one of these studies is extremely high. For example, the City of San Diego, California decided to fund a $750,000 disparity study in 1993. C. Van Housen, Judge Blocks Program to Hire Minority Women Contractors, San Diego

[26]Only twice in this Court's history has it invalidated legislation on improper-delegation grounds. See Schechter Poultry v. United States, 295 U.S. 495 (1935) and Panama Refining Co. v. Ryan, 293 U.S. 388 (1935). In the sixty years subsequent to these National Industrial Recovery Act cases, *all* Supreme Court cases involving the delegation doctrine have uniformly upheld broad delegations of rulemaking power to agencies. By challenging the SBA as an impermissible delegation of Congress' legislative authority, Petitioner ignores the vast majority of the Court's precedent in this area.

Business Journal (October 4, 1993) at 70. In order for the federal government to undertake studies in each state to determine state-wide (or even local geographic area-wide) need for MBE programs would be staggering.

Given the plethora of information in the public domain available to Congress and to federal agencies, it is a much more sensible approach to allow Congress to delegate its power to determine what affirmative action programs are appropriate to federal agencies which are directly involved in the contracting process and aware of the need to increase MBE participation in government contracting. Indeed, with regard to the construction industry, this Court has taken judicial notice of the pervasiveness of discrimination. United Steelworkers of America v. Weber, 443 U.S. 193, 198 n.1 (1979).

B. The Subcontracting Compensation Clause Program Does Not Require the Federal Agency to Conduct a Croson Inquiry Because Fullilove Controls.

In order to fulfill its congressional mandate under the SBA, in 1979, the Department of Transportation through the FLHP, implemented the subcontracting compensation clause program (SCC). To qualify for eligibility under the SCC program, a small business must demonstrate through an annual certification process that it is socially and economically disadvantaged. The SCC and its eligibility requirements comport with the SBA's definitions of socially and economically disadvantaged business concerns as defined by Congress. As such, the SCC provisions carry a heavy presumption of validity. When Congress explicitly or implicitly delegates to agencies the power to elucidate a specific provision of a statute, the resulting agency action is entitled to deference. Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984).

Petitioner argues that, before the FLHP– a federal agency acting pursuant to a congressional mandate– may implement and administer the SCC program, it must conduct the inquiry set forth in Croson. As the Court of Appeals for the Tenth Circuit stressed, "The question of congressional action was not before the Court in Croson." Adarand Constructors, Inc. v. Peña 16 F.3d 1537, 1544 (10th Cir. 1994). Under Croson, strict scrutiny must be applied

when Congress does not act, and instead, public state and/or local entities impose programs containing racial classifications.

Unlike Congress, state and local governments do not possess affirmative grants of authority from Section 5 to enforce the Fourteenth Amendment. See Fullilove, supra. For this reason, local and state programs are not entitled to the same level of deference as congressional programs. Race-conscious affirmative action programs mandated by Congress are only subject to intermediate scrutiny. Metro, supra. As explained by Judge Posner in Milwaukee County Pavers Ass'n v. Fielder, supra (1991), the "joint lesson of Fullilove and Croson" is "that the federal government can, by virtue of thee enforcement clause of the Fourteenth Amendment, engage in affirmative action with a freer hand than states and municipalities can do."

In any case, the program at issue here is a congressional program. Not only was it authorized by Congress, but it was mandated by Congress. The Small Business Act directs each federal agency to establish goals for small business participation in federal procurement contracts. By implementing the SCC program, the Department of Transportation's FLHP was merely complying with a detailed congressional directive. The SCC program can only properly be characterized as a program of the federal government. Nothing in its implementation or administration mystically transforms it into a state or local program, subjecting it to Croson's findings requirement or standard of scrutiny.

As with a state, if Congress can require a federal agency to comply and implement its affirmative action legislation, agency action to create the means of fulfilling the legislation's requirements must also be permitted. S.J. Groves & Sons Co. v. Fulton County, 920 F.2d 752, 767 (11th Cir. 1991) (if Congress developed the program, as opposed to a state or local government, intermediate scrutiny is appropriate.); Ellis, supra at 916 (Fullilove applies to state implementation of federal affirmative action program); Tennessee Asphalt Co. v. Farris, 942 F. 2d 969, 975 (6th Cir. 1991) (state's compliance with mandates of federal scheme is nothing more than compliance with federal law and Fullilove controls); Milwaukee County Pavers Association v. Fiedler, supra (insofar as state complies with federal law Fullilove controls); Harrison & Burrowes Bridge Constructors v. Cuomo,

743 F. Supp. 977, 1005 (N.D.N.Y. 1990) ("If Congress can require states to comply with race-conscious requirements, state legislation enacted to create the means of fulfilling those requirements must also be permitted," (quoting Milwaukee, supra at 1545-46)).

Under the traditional standards governing the delegation of authority, the FLHP was fully empowered to implement the SCC program. "Congress... took a power which [it] possessed and, instead of exercising it directly, chose to delegate it. This is the process by which all federal regulations are promulgated and to forbid it would be to necessarily dismantle the entire structure of the Executive Branch." Hampton v. Mow Sun Wong, supra at 124 (1976) (Rehnquist, J., White, J., and Blackmun, J., dissenting).

CONCLUSION

Petitioners are asking this Court to reconsider settled law, and carry a heavy burden in doing so. As detailed above, this Court has set forth the factors that can lead to a reversal of prior decisions, and none of these factors is present here. Furthermore, a review of the various post-Croson studies leads to a clear conclusion: in the absence of DBE programs, underutilization of available minority businesses is dramatic and persistent.

The Civil War Amendments granted Congress a special role in remedying the effects of racial discrimination: it has power in this area broader than that of any other governmental entity, and the duty to use that power to fulfill the goals of the amendments. The Small Business Act and the Surface Transportation Assistance Act of 1982 are valid exercises of that power, entailing a necessary delegation of some authority to agencies so that they can tailor their actions to the needs of the affected localities. To deny Congress the authority to take this reasonable measure would be an unwarranted judicial intrusion upon Congress's constitutionally-mandated prerogative to address racial inequities.

For the foregoing reasons, it is respectfully submitted that the judgment of the court below should be affirmed.

Respectfully submitted,

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In the

Supreme Court of the United States

October Term, 1994

ADARAND CONSTRUCTORS, INC.,
Petitioner,

v.

FEDERICO PENA, Secretary of Transportation et al.,
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF OF AMICUS CURIAE OF THE MARYLAND WOMEN BUSINESS ENTREPRENEURS ASSOCIATION, THE NATIONAL ASSOCIATION OF WOMEN BUSINESS OWNERS, THE ILLINOIS ASSOCIATION OF WOMEN CONTRACTORS AND ENTREPRENEURS, WBE LINE, INC., FEDERATION OF WOMEN CONTRACTORS & WOMEN'S BUSINESS DEVELOPMENT CENTER IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST

The Maryland Women Business Entrepreneurs Association, the National Association of Women Business Owners, the Illinois Association of Women Contractors and Entrepreneurs, WBE Line, Inc., the Federation of Women Contractors, and the Women's Business Development Center ("Coalition") filing this amicus curiae brief[1] are organizations consisting of approximately 5,000 women business owners throughout the United States. Providing women business owners with the opportunity to fairly compete for federal government contracts is one of the primary missions of the Coalition organizations. These Coalition members represent virtually all service and trade industries, and act as prime contractors and subcontractors. A significant number of these women have been afforded the realistic opportunity to contract with the federal government under the auspices of § 502 of the Small Business Act and § 105(f) of the Surface Transportation Relocation Assistance Act ("STURAA").

Coalition members have experienced and studied the detrimental effects of a closed federal procurement market on women business owners. Without the Small Business Act and STURAA goals programs, many of the Coalition members would not have had the opportunity to bid for federal contracts or subcontracts. These programs have proven to be effective means of breaking down the inherent and systematic barriers which have prevented many women business owners from competing and developing their businesses into mature and stable entities.

Should the Small Business Act or STURAA goals program be dismantled, this would inevitably result in fewer

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[1] Pursuant to Rule 35 of the Rules of the Supreme Court of the United States, letters from counsel of record for the parties evidencing their consent to the filing of this brief have been filed separately.

federal contracts and subcontracts being awarded to women business owners and a continuation of discrimination against them, further stifling their economic development.

STATEMENT OF FACTS

At the center of this case is a subcontracting compensation clause ("SCC") used by the Central Federal Lands Highway Division (CFLHD)[2] which provides a financial incentive to a prime contractor when it subcontracts with small businesses owned and controlled by socially and economically disadvantaged individuals.[3] This type of small business is commonly referred to as a Disadvantaged Business Enterprise ("DBE"). The CFLHD contract states that:

> [a] small business concern will be considered a DBE after it has been certified as such by the U.S. Small Business Administration or any State Highway Agency. Certification by other Government agencies, counties, or cities may be acceptable on an individual basis provided the Contracting Officer has determined that the certifying agency has an acceptable and viable DBE certification program. If the Contractor requests payment under this provision, the Contractor shall furnish the Engineer with acceptable evidence of the subcontractor(s) DBE certification and shall furnish one certified copy of the executed subcontract(s).

A prime contractor must use a certified DBE to take advantage of the SCC. The CFLHD does not certify businesses as DBEs, but the Small Business Administration (SBA) and the U.S. Department of Transportation (DOT) do.[4]

In this case, a contract was awarded to Mountain Gravel and Construction Company ("Mountain Gravel") to construct a 4.7 mile section of highway referred to as the West Dolores Project. Adarand Constructors, Inc. submitted a bid to Mountain Gravel for the guardrail portion of the project as did Gonzales Construction ("Gonzales"), a DBE. Mountain Gravel awarded the subcontract to Gonzales. Adarand filed suit in the District Court for the District of Colorado, claiming that although Gonzales had submitted a higher bid than Adarand, Gonzales was awarded the contract because it was a DBE and Mountain Gravel received a compensation bonus for using a DBE on the subcontract. Therefore, Adarand claimed it was denied equal protection under the law. The District Court rejected this argument and the Tenth Circuit Court of Appeals affirmed. Adarand filed a petition for certiorari which was accepted by this Court.

Petitioner argues that the criteria used by the SBA for DBE certification is unconstitutional because it creates a presumption that favors minorities. Further, it claims that CFLHD utilized the DBE requirement in conjunction with the SCC to comply with the goal requirements of § 502 of the Small Business Act. Therefore, Petitioner argues that § 502 is unconstitutional as applied.

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[2] The CFHLD is a division of the Federal Lands Highway Program ("FLHP"), which implements programs of the Federal Highway Administration ("FHWA"), a division of the U.S. Department of Transportation ("DOT").

[3] The SCC provides added compensation of up to 1.5% of the total contract amount to any prime contractor who subcontracted 10% or more of the work. See Joint Appendix at 24-27.

[4] The certification process created by DOT is implemented by the various federal, state, and other governmental entities that receive and utilize federal funds on their projects.

Section 502 of Small Business Act requires government-wide goals for procurement with DBEs.[5] One method by which the SBA implements this requirement is through § 8(a) of the Act, commonly referred to as the 8(a) Program.[6] Among other things, the Act sets forth five criteria used to certify a company as a DBE.[7] The SBA has also developed a presumption that certain minority and ethnic groups are socially disadvantaged, one element of the necessary criteria for certification.[8] This presumption is not contained in the Act.[9]

The SBA has created a subcontracting program, commonly referred to as the 8(d) program.[10] This section of the Small Business Act provides contract language that must be included in a subcontract awarded for a federal project; "[t]he contractor shall presume that socially and economically disadvantaged individuals include Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities, or other individuals found to be disadvantaged by the Administration pursuant to § 8(a) of the Small Business Act."[11]

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[5] 15 U.S.C. § 644(g)(Supp. 1994).

[6] 15 U.S.C. § 637(a)(Supp. 1994).

[7] 15 U.S.C. § 637(a)(Supp. 1994) *passim*. (As more fully explained in Argument I.)

[8] This presumption is contained in the regulations implementing the 8(a) Program and is found at 13 C.F.R. § 124.105(b)(1988).

[9] The 8(a) Program is defined and created by 15 U.S.C. § 637(a)(Supp. 1994), which is devoid of any congressional language creating a presumption. There are, however, findings in the statute which state that certain minority groups are economically and socially disadvantaged. 15 U.S.C.§ 631(f)(1)(A)-(C).

[10] 15 U.S.C. § 637(d)(Supp. 1994).

[11] 13 C.F.R. § 124.106(b)(1)(1988).

Congress has also passed legislation creating a DBE goal program for the DOT.[12] This legislation was implemented through regulations at 49 C.F.R., Pt. 23(1988). Similar to the two SBA programs, certification under the DOT process, requires compliance with five elements. Unlike the SBA programs, however, the legislation creating the DOT program contains a statutory rebuttable presumption, specifically providing that women, in addition to racial and ethnic groups, shall be presumed to be socially and economically disadvantaged[13], satisfying two of the five elements.

The narrow issue involved in this case is the constitutionality of § 502 of the Act: "For purposes of this appeal, both parties stipulate that the SCC program is authorized by § 502 of the Small Business Act, 15 U.S.C. § 644(g)(Supp. 1994), and that the constitutionality of STAA

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[12] In 1982, Congress passed the Surface Transportation Assistance Act ("STAA") Pub. L. 97-424, 96 Stat. 2100 (1982) which required state agencies to spend 10% of their federal-aid highway funds on contracts with firms participating in the DBE program. The DBE program was comprised of small businesses which were at least 51% owned and controlled by socially and economically disadvantaged individuals. STAA provided that certain racial and ethnic minorities were presumed to be socially and economically disadvantaged. In 1987, Congress added women to the presumption through the Surface Transportation and Uniform Relocation Assistance Act of 1987 ("STURAA") Pub. L. 100-17, 101 Stat. 144 (1987). The provisions of these two acts were later incorporated into the Intermodal Surface Transportation Efficiency Act of 1991, Pub. L. 102-240, 105 Stat. 1914 (1991) which carries forward the DBE program intact.

[13] *See* Selected Documents Pertaining to the Women's Business Ownership Act of 1988, House Comm. on Small Business, 100th Cong., 2d Sess. (1988). (The House Committee found that "[w]omen have suffered from centuries of prejudice, discrimination, and exploitation.") *Id.* at 1.

and STURAA is not at issue."[14] Part I of Amici's brief will address the § 502 issue.

Despite the stipulation, Petitioner has consistently failed to recognize the distinctions between the SBA programs and the DOT program, treating them as one. Hence, the question accepted for certiorari by this Court is not limited merely to § 502. Instead, it deals with any federal highway goals program, thus implicating the DOT program.[15] The remainder of Amici's brief will demonstrate that this latter program passes constitutional muster.

SUMMARY OF ARGUMENT

Section 502 of the Small Business Act is not race-conscious. Therefore, this Court should consider it to be economic legislation warranting only review under the rational basis standard. Section 502 was enacted to promote the development of disadvantaged businesses to enable them to compete on an equal basis in the American economy. There is ample evidence of the strides made by those disadvantaged businesses who have benefited from § 502 to conclude that it does not violate the Equal Protection Clause.

The goals program under § 502 refers in part to the STURAA goals program. The latter program creates a presumption that women are socially and economically disadvantaged. This Court has consistently applied intermediate scrutiny to gender-based legislation and should do so here. Otherwise, application of strict scrutiny review will

[14] *Adarand Constructors, Inc. v. Pena*, 16 F.3d 1537, 1539 (10th Cir. 1994).

[15] The Tenth Circuit Court of Appeals held that Petitioner did not have standing to assert that STURAA's gender presumption was constitutionally impermissible. *Id.* at 1543. Amici do not concede by making the arguments related to DOT that Petitioner has standing.

have the unintended result of discarding 23 years of settled law, in addition to continuing to impair the ability of women to achieve true economic equality.

Contrary to Petitioner's claim, this Court's previous decisions require review under the intermediate level of scrutiny for a program created by Congress to remedy past discrimination. This Court's recent ruling in *Metro Broadcasting v. Federal Communications Commission* compels this result.

Finally, applying this intermediate level of scrutiny will result in upholding the constitutionality of STURAA. For these reasons, this Court should affirm the decision of the Tenth Circuit Court of Appeals.

I. SECTION 502 OF THE SMALL BUSINESS ACT IS NOT RACE-CONSCIOUS LEGISLATION AND, THEREFORE, THE STRICT SCRUTINY ANALYSIS IS NOT APPLICABLE.

The underlying premise of Petitioner's argument is that the race of the business owner is the deciding factor in the DBE certification process under § 502 of the Act.[16] This premise is incorrect and is fatal to the remainder of Petitioner's argument.

A. Congress Did Not Define a Disadvantaged Business as a Minority Business.

When Congress enacted § 502 of the Act, it specifically required that government agencies act in such a manner so as to benefit certain small businesses. The statute specifically defines the type of business Congress intended to benefit: "[n]otwithstanding the Government-wide goal, each agency

[16] Petitioner's Brief at 18.

shall have an annual goal that presents, for that agency, the maximum practicable opportunity for small business concerns and small business concerns owned and controlled by socially and economically disadvantaged individuals to participate in the performance of contracts let by such agency"[17] As outlined in the Statement of Facts, this type of business is referred to as a DBE, and the SCC required subcontractors to be certified. Becoming certified as a DBE is a complex process open to all companies that can demonstrate they can meet the criteria. Race can be a factor in the process, but Petitioner is wrong when it asserts that race is the only factor.

In determining certification, the certifying agency investigates the applicant and applies five separate criteria derived from the statutory definition contained in 15 U.S.C. § 644(g)(l)(Supp. 1994). A business must demonstrate that it meets each of the following elements:

1. Small business size;[18]

2. Socially disadvantaged owner;[19]

3. Economically disadvantaged owner;[20]

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[17] 15 U.S.C. § 644(g)(1)(Supp. 1994) (emphasis added).

[18] Small business is defined by the SBA in terms of dollar size limitations. 15 U.S.C. § 632(a)(Supp. 1994).

[19] Socially disadvantaged individuals are those who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities. 15 U.S.C. § 637(a)(5)(Supp. 1994).

[20] Economically disadvantaged individuals are those socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business areas who are not socially disadvantaged. 15 U.S.C. § 637(a)(6)(A)(Supp. 1994).

4. Ownership by the disadvantaged owner must be real and substantial; and[21]

5. Control of the business by the disadvantaged owner must be real and continuing.[22]

In none of these definitions is any group given beneficial treatment. Indeed, no racial group is even mentioned.[23] On the contrary, the carefully crafted statute was designed to aid any business which meets these elements, and specifically avoids using race as a determinative factor.

B. Creation of a Rebuttable Presumption Does Not Make the Statute Race-Conscious.

The only place where race or ethnic origin is solely used as a determinative factor in the entire process is at 13 C.F.R. §124.105(b)(1988). This regulation creates a rebuttable presumption that certain racial and ethnic groups are presumed to be socially disadvantaged. Essentially the rebuttable

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[21] Ownership is satisfied by a small business which is at least 51% owned by a socially and economically disadvantaged individual. 15 U.S.C. § 637(a)(4)(A)(Supp. 1994).

[22] Control is satisfied by a small business whose management and daily operations are controlled by a socially and economically disadvantaged individual. 15 U.S.C. § 637(a)(4)(B)(Supp. 1994).

[23] Petitioner argues that 15 U.S.C. § 637(d)(Supp. 1994) creates a statutory social and economic presumption. This portion of the statute provides that government contracts contain specific language and that the contractor can presume that certain groups are socially and economically disadvantaged. It does not provide that these groups are presumed to be socially and economically disadvantaged for any other purpose, specifically including Section 502 of the Small Business Act. The SBA promulgated regulations that included a presumption, but the presumption does not exist in the statute. See footnote 9 supra.

presumption allows an applicant who falls within a specified classification to avoid having to prove his or her compliance with the second criteria of the certification requirement. It does not, however, allow an applicant within that classification to automatically become certified. On the contrary, the applicant must still demonstrate his or her compliance with the remaining four certification elements -- economic disadvantage, small business size, ownership of the business, and control of the business. There are numerous administrative decisions where minority business owners who fell within the presumption have been denied certification as DBEs for failure to meet these other criteria.[24] Furthermore, an applicant can become certified as a DBE without the use of the rebuttable presumption by demonstrating that, in addition to the other criteria, it satisfies the social disadvantaged requirement.[25] This ability to prove social disadvantage without the benefit of the presumption is demonstrated by the fact that non-minority women-owned businesses have been certified as DBEs by the SBA.[26]

No presumption for economically disadvantaged individuals exists in the 8(a) program. Applicants are required to prove they meet the definition of an economically

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[24] For example, according to the FHA, statistics of Region III in 1992 show that several states denied certification to minority companies for failure to meet the eligibility criteria in spite of the presumption: New Jersey denied certification to D.W. Electric, Inc. because ownership was not real and substantial; Washington denied certification to Input Output Services, Inc. for lack of necessary control; California denied certification to True North Energy Co. because ownership was not real and substantial. In the State of Michigan, between 1991 and 1993, the Office of Equal Opportunity denied DBE certification to twelve minority-owned businesses for failure to meet the remaining criteria.

[25] 13 C.F.R. § 105(c)(1994).

[26] Women are not a class presumed to be socially and economically disadvantaged.

disadvantaged individual as set forth in the statute at 15 U.S.C. § 637(a)(6)(A)(Supp. 1994). In fact, SBA has articulated the following policy: "[t]his program is not intended to assist concerns owned and controlled by socially disadvantaged individuals who have accumulated substantial wealth, who have unlimited growth potential or who have not experienced, or have overcome, impediments to obtaining access to financing, markets and resources."[27] Furthermore, once a DBE is certified and the SBA believes it is no longer economically disadvantaged, the SBA will conduct a review of its status.[28] Finally, the SBA will review any certification decision whenever a member of the public submits credible evidence that the SBA was given false information, or changes have occurred relating to the business or individual that no longer make it, or him or her, eligible based on economic disadvantage.[29]

In summary, such a process is hardly one where "race [is] the primary factor for the awarding of federal construction procurement contracts by the federal government."[30] The statute in question is not race-conscious and, therefore, the necessity for strict scrutiny is obviated.

C. Section 502 of the Act, in the Absence of the Rebuttable Presumptions, is Constitutional Under a Standard of Rationality.

As amply demonstrated above, § 502 of the Act on its face is racially neutral. Its design is to aid any disadvantaged business enterprise, not just those owned and controlled by

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[27] 13 C.F.R. § 124.106(a)(ii)(1994).

[28] 15 U.S.C. § 637(a)(6)(A)(Supp. 1994).

[29] 13 C.F.R. § 124.101(c)(2)(1994).

[30] Petitioner's Brief at 18.

racial and ethnic minorities. Only the rebuttable presumptions created by regulation give the Petitioner any ability to argue that § 502 of the Act is racially driven, and that a heightened level of scrutiny is necessary in examining it.

In the absence of the presumptions, § 502 of the Act should be considered economic legislation designed to aid small disadvantaged businesses. All applicants, regardless of race, ethnicity, or gender, would be required to demonstrate that they meet the specified criteria for certification. No groups would be entitled to any type of preferential treatment. Thus, the legislation would be similar to the myriad of other statutes that this Court has reviewed and found constitutional in the past.[31] The Court's analysis of these statutes was accomplished under a standard of rationality -- whether the legislation bears a reasonable relation to the purpose that it serves.

This Court should apply the rational basis standard to § 502 of the Act. If this Court elects to deviate from its past precedents and applies strict scrutiny, it should not review the entire Act under that standard. Instead, strict scrutiny should be applied, if at all, to the rebuttable presumptions created by the implementing regulations, since it is only in those

[31] *See e.g., Schweiker v. Wilson*, 450 U.S. 221 (1981) (provision of social security program denying benefits to persons in mental institutions constitutional); *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981) (state law banning sale of milk in non returnable plastic containers, but not banning non returnable cardboard containers constitutional); *Mathews v. DeCastro*, 429 U.S. 181 (1976) (provision of social security program granting benefits to married women with dependents when husband retires or becomes disabled, but not to divorced women, was constitutional).

presumptions that race or ethnic origin is the sole determinative factor.[32] The Act is constitutional.

II. CONGRESS INCLUDED WOMEN WITHIN THE SOCIAL AND ECONOMIC PRESUMPTION IN STURAA SO AN INTERMEDIATE LEVEL OF SCRUTINY IS APPROPRIATE.

For purposes of this case, the Small Business Act procurement process at issue does not stand in isolation. It is intertwined with the DOT Disadvantaged Business Enterprise program.[33] As indicated in the opinion of the Tenth Circuit Court of Appeals:[34] "[t]he eligibility criteria, however, are derived from the DBE regulatory program implemented pursuant to two transportation funding authority acts: STAA, and its renewal act, STURAA. A subcontractor thus qualifies for the SCC program if it qualifies for DBE status under STURAA regulations." Consequently, although this action ostensibly deals with the SBA programs only, it necessarily involves a review of the DOT program. Although the DOT program is quite similar to the SBA programs under review, it differs in two major regards.

First, the DOT program includes women within the rebuttable presumption of socially and economically disadvantaged persons, while the SBA program does not. Consequently, a decision by this Court regarding the race-conscious rebuttable presumption of the SBA programs may inadvertently impact upon the gender-based presumption of

[32] *See Alaska Airlines v. Brock*, 480 U.S. 678 (1987); *Cf., Jean v. Nelson*, 472 U.S. 846 (1985) (court ought not pass on constitutional issues unless adjudication of such is unavoidable).

[33] The regulations and criteria for this program are contained at 49 C.F.R., Pt. 23(1988).

[34] *Adarand v. Pena*, 16 F.3d 1537, 1540-41 (10th Cir. 1994).

the DOT program. Second, the rebuttable presumption in the DOT program is statutorily created while the presumptions in the SBA programs are derived from regulations.

Petitioner argues that the proper standard of review for the SBA programs is the strict scrutiny standard that this Court has employed when reviewing challenges based on race. If the Court adopts this analysis, the unintended result would be to apply the strict scrutiny standard to a gender presumption in the DOT program and sweep away 23 years of settled law.

For a quarter of a century, this Court has consistently held that an intermediate level of scrutiny is the proper standard to be applied when analyzing the constitutionality of legislation employing gender-based classifications. This standard was first suggested in *Reed v. Reed*:[35] "A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.'" This intermediate standard of review has been consistently used by this Court in resolving gender-based constitutional challenges.[36]

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[35] 404 U.S. 71, 76 (1971) (citing *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920)).

[36] *See Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982); *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464 (1981); *Orr v. Orr*, 440 U.S. 283 (1979); *Craig v Boren*, 429 U.S. 190 (1976). *See also Frontiero v. Richardson*, 411 U.S. 677 (1973). In *Frontiero*, several Justices were willing to apply the strict scrutiny standard to gender-based discrimination that they had developed for analyzing racially based legislation. However, this view has never been accepted by a majority of this Court, and subsequent cases have clarified that the intermediate standard is the proper one to utilize in gender discrimination cases: "[t]o withstand constitutional challenge, previous cases establish that classification by gender must serve important governmental objectives and must be substantially related to the achievement of those objectives." *Craig*, 429 U.S. at 197.

The inclusion of women in the DOT program demonstrates that neither statute is racially based. Rather, they aim to assist all disadvantaged businesses.[37] Disadvantaged businesses include those owned by non minority women; they could include those owned by non minority men. Thus, the strict scrutiny analysis is certainly inappropriate.

If the subcontracting company that was awarded the contract had been owned by a woman, the Tenth Circuit's standard of review would have been unquestionably correct and this case would not be before this Court. Yet, if this Court adopts Petitioner's arguments, women business owners will lose the advantages provided by the DOT program: advantages that are constitutional as applied to women. This Court should tread lightly in declaring unconstitutional, on racial grounds, a disadvantaged business program that, facially, and as applied to women, most certainly is constitutional under numerous decisions issued by this Court.

III. THE TENTH CIRCUIT COURT OF APPEALS APPLIED THE CORRECT STANDARD OF REVIEW UNDER APPLICABLE SUPREME COURT CASES.

In reviewing the decision of the Court of Appeals, this Court is bound by its four-year old opinion in *Metro Broadcasting, Inc. v. Federal Communications Commission*.[38] There, a majority of this Court held that an intermediate standard of scrutiny was appropriate in reviewing programs of the type involved in this case:

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[37] *See supra* Argument I.

[38] 497 U.S. 547 (1990).

> We hold that benign race-conscious measures mandated by Congress -- even if those measures are not 'remedial' in the sense of being designed to compensate victims of past governmental or societal discrimination -- are constitutionally permissible to the extent that they serve important governmental objectives within the power of Congress and are substantially related to achievement of those objectives.[39]

This was the standard applied by the Tenth Circuit, and it is the proper one to apply here.

Petitioner argues that *Metro* is inapplicable to this case and attempts to distinguish it on the grounds that it dealt solely with First Amendment concerns. Such is not the circumstance. Indeed, a review of the Court's two previous decisions regarding affirmative action contracting programs demonstrates that *Metro* is the logical result of these cases.

Fullilove v. Klutznick[40] is the first instance where the Court wrestled with the issue of a government contracting program designed to remediate past discrimination. There, a provision of the federal Public Works Employment Act of 1977 required ten percent of the federal funds granted for local public works projects to be used by state and local grantees to obtain services or supplies from minority businesses. This Court upheld the validity of the provision, although the various opinions did not rely upon the pronouncement of a specific standard of review. At least five Justices adopted either a standard of intermediate scrutiny,[41] or a two-step approach focusing first on the objective of the

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[39] *Id.* at 564-65.

[40] 448 U.S. 448 (1980).

[41] *Id.* (Marshall, J., concurring).

congressional legislation, and, second, on whether the means selected were specifically tailored to meet that objective.[42]

Several years later, the Court was faced with a similar public works provision established by the City of Richmond. In *City of Richmond v. J.A. Croson Co.*,[43] this Court rejected the City's program as unconstitutional. The Court, however, recognized the distinction between a remediation program established by Congress in *Fullilove*, and one established by a state or political subdivision as was involved in *Croson*.[44] The former implicates a grant of authority to Congress in § 5 of the 14th Amendment, while the latter entails a constraint of power on the states under § 1 of that Amendment.[45] Yet even in *Croson*, the Court continued to adhere to the two-step analysis of Chief Justice Burger used in *Fullilove* with respect to congressional programs.

Thus, the lessons of *Fullilove* and *Croson* are clear: in reviewing state action taken to remedy past discrimination, the Constitution may require that strict scrutiny be applied to ensure that the 14th Amendment is not violated. When the

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[42] *Id.* (Burger, C.J., concurring). *Compare Craig*, 429 U.S. 190 (1976), in which the majority imposed an intermediate level of scrutiny in gender classification cases.

[43] 488 U.S. 469 (1989).

[44] Justice O'Connor, writing for the majority, stated: "[t]hus, our treatment of an exercise of congressional power in Fullilove cannot be dispositive here." *Id.* at 491.

[45] Petitioner fails to recognize that this unique grant of congressional power to remedy past discrimination -- present in both *Fullilove* and the present case -- was absent in *Croson* and *Metro*. Indeed, *Croson* was decided, in part, on this basis, as was the dissent's attempts in *Metro* to impose a stricter standard of scrutiny. *Metro*, 497 U.S. at 605-606 (O'Connor, J., dissenting). Thus, Petitioner cannot point to a single case where strict scrutiny was applied, or even adopted by a sizable dissent, in a case involving a congressional program designed to remedy past discrimination.

program is established by Congress, a lesser standard is applicable. *Metro* correctly recognized these lessons and authorized an intermediate standard of review in those cases involving congressional actions.[46]

IV. THE STURAA GENDER PRESUMPTION SERVES AN IMPORTANT GOVERNMENTAL OBJECTIVE AND IS SUBSTANTIALLY RELATED TO ACHIEVING THAT OBJECTIVE.

A. Congress Determined That Discrimination Against Women Business Owners Must Be Remedied, And Had an Adequate Basis For Doing So.

> This Court is in agreement that whatever the formulation employed, remedying past or present racial discrimination by a state actor is a sufficiently weighty state interest to warrant the remedial use of a carefully constructed affirmative action program. This remedial purpose need not be accompanied by contemporaneous findings of actual discrimination to be accepted as legitimate as long as the public actor has a firm basis for believing that remedial action is required.[47]

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[46] *Metro* goes beyond *Fullilove* in holding that such a standard is applicable even if the measures are not remedial, per se. This portion of the holding in *Metro* is not at issue in the present case, since the program in question, like the one in *Fullilove*, is specifically designed to remedy past discrimination.

[47] *Wygant v. Jackson Board of Educ.*, 476 U.S. 267, 286 (1986)(O'Connor, J., concurring). *See also*, *Craig*, 429 U.S. 190 (1976) (Rehnquist, J., dissenting) ("A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *Id.* at 222.); *Croson*, 488 U.S. at 469. (O'Connor, J, majority opinion) ("Congress may identify and redress the effects of society-wide

Thus, Congress was not required to make specific findings of discrimination when enacting STURAA. Rather, it could rely upon past findings and hearings to support its conclusion that a gender presumption was necessary to rectify the past and present discrimination faced by women in virtually every arena, including public contracting. The Senate oversight committee held a hearing on the proposed STURAA, and noted that:

> The Committee has considered extensive testimony and evidence on the bill's DBE provision, and has concluded that this provision is necessary to remedy the discrimination faced by socially and economically disadvantaged persons attempting to compete in the highway and mass transit construction industry. Congress originally addressed this issue in § 105(f) of the 1982 STAA. . . .
>
> Section 105(f) has helped to reduce the effects of discrimination; however, barriers still remain, preventing minorities and women from successfully competing in the industry. Moreover, the Committee has concluded that the findings adopted by Congress in 1978 when enacting legislation covering projects under the Small Business Act, 15 U.S.C. § 631(e) (Supp. 1994), apply equally to the federally-funded highway and mass transit construction projects covered by this bill.
>
> The DBE program implemented by the Department of Transportation following enactment of § 105(f) operates primarily as a subcontracting program, under which prime contractors must make

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discrimination [and] need not make specific findings of discrimination." *Id.* at 490.)

good faith efforts to achieve DBE subcontracting goals. The Committee has studied the materials presented by non minority subcontractors regarding the program's impact on their businesses. The increased funding for highway and mass transit construction projects has increased the opportunities for subcontractors to compete, and the good faith efforts provision of the program assures that the program does not operate as a quota. Also, since DBE firms compete in many areas of subcontracting, any burden that might be imposed by this program is spread among different groups of subcontractors.[48]

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[48] Numerous other congressional committees and members of Congress have acknowledged the exclusion of women from the federal procurement market and expressed the need to solve this problem. *See, e.g., Federal Contracting Opportunities for Minority and Women-Owned Businesses: Small Business and the Federal Procurement System, Hearings Before the Subcomm. on General Oversight, House Comm. on Small Business*, 97th Cong., 1st Sess. (1981); *The Disadvantaged Business Enterprise Program of the Federal-Aid Highway Act: Hearings before the Subcomm. on Transportation of the Senate Comm. on Environment and Public Works*, 99th Cong. 1st Sess. (1985); *Women Entrepreneurs: Their Success and Problems: Hearing Before the Senate Comm. on Small Business*, 98th Cong., 2d Sess. (1984); S. Rep. No. 387, 100th Cong; 1st Sess. at 11-12 (1987); *H.R. 2351, The Women's Business Equity Act of 1989: Hearing Before Subcomm. on Procurement, Tourism, and Rural Development, House Comm. on Small Business* (Testimony of Ike Skelton, "Women entrepreneurs are vital to our economy. They must have equal access" *Id.* at 42-43,); *Women-Owned Businesses: Special Problems and Access to Credit, Hearing Before the Subcomm. on Exports, Tax Policy, and Special Problems House Small Business Comm.*, 101st Cong., 2d Sess. (1990).

Six hearings were held by the U.S. House of Representatives Small Business Committee in 1988 on problems facing women entrepreneurs. These are summarized in H. Rep. No. 100-736, 100th Cong., 2nd Sess. (1988)(New Economic Realities: The Rise of Women Entrepreneurs). The Committee found that women continue to confront barriers in

Thus, the congressional record is replete with evidence of the discrimination faced by women business owners. Congress treats this as a serious national problem and seeks through STURAA and other measures to assist the economic development of women-owned businesses. The legislation has accomplished this objective to a limited degree. Women-owned businesses have been awarded a greater percentage of subcontracts each year since STURAA's enactment.[49]

Because an important governmental objective has been, and will be, substantially furthered, this gender presumption passes scrutiny under the Equal Protection Clause. *Craig v. Boren*, 429 U.S. 190 (1976). There can be no question that Congress had a firm basis upon which to enact STURAA in an attempt to remedy this pervasive discrimination against women.

B. <u>The Implementation of STURAA is Substantially Related to the Government's Objectives.</u>

One of the objectives of STURAA is to ensure women-owned businesses are better able to compete for government

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receiving commercial credit due to their gender, and women-owned businesses are virtually excluded from government procurement activities, among other things. *Id.*

[49] Since the Congress changed the law in 1987 to include businesses owned by non minority women in the statutory definition of DBEs, the percentage of DBE contract dollars awarded to women-owned firms has increased from 22 to 39 percent. When measured in constant fiscal year 1992 dollars, contract dollar awards to women-owned businesses increased by over 80 percent in fiscal years 1984 through 1992. . . .

Highway Contracting: Disadvantaged Business Program Meets Contract Goal, But Refinements Are Needed, GEN. ACCT. OFF., Aug. 1994 at 4.

contracts despite past discrimination. It accomplishes precisely what it sets out to do.[50] And it does so in a flexible manner which ensures minimal impact on non-women-owned businesses.

STURAA is substantially related to achieving the objectives set out by Congress in that it is neither over inclusive or under inclusive.[51] First, the program is not under inclusive because all small businesses which satisfy the eligibility requirements for the program can be certified and participate.[52] No business is excluded by the racial and gender presumptions.[53] The *Fullilove* Court foresaw and approved of this type of program.[54] Second, STURAA is not over inclusive because even though minority- and women-owned businesses are presumed to be socially and economically disadvantaged, to be certified they must show they can meet the other criteria:[55] small business size, ownership, and control. Therefore, not all companies owned by women and minorities can participate. Additionally, it is not over inclusive because a waiver can be employed in the event of a lack of capacity.[56]

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[50] *See Fullilove* , 448 U.S. 448, 480 (1980); *Metro*, 497 U.S. 547, 569 (1990).

[51] *See Fullilove*, 448 U.S. at 485-486.

[52] 49 C.F.R., Pt., 23.53(1988).

[53] 49 C.F.R., Pt., 23.62(1988).

[54] *Fullilove*, 448 U.S. at 485.

[55] *See Craig v. Boren*, 429 U.S. 190 (1976) (Rehnquist, J., dissenting) ("The rationality of a statutory classification for equal protection purposes does not depend upon the statistical 'fit' between the class and the trait sought to be singled out. It turns on whether there may be a sufficiently higher incidence of the trait within the included class than in the excluded class to justify different treatment." *Id.* at 225-226.)

[56] STURAA provides Secretarial discretion in lowering the 10% goal for DBEs, 49 U.S.C. § 47113(b). One of the committees providing

Importantly, the presumption of social and economic disadvantage is rebuttable.[57] Any credible evidence that the applicant is not socially and economically disadvantaged, rebuts the presumption and places the burden on the applicant to affirmatively prove he or she qualifies.[58] Anyone can challenge the presumption as applied to an applicant, including the governmental agency that is implementing the program. In fact, the guidance given to the agencies implementing the certification regulations specifically warns that the presumption should not be applied in the face of conflicting data, even if a third party does not challenge the presumption: "the existence of the presumption does not mean that the certifying agency must ignore evidence that any applicant for certification is not socially or economically disadvantaged unless a third party brings a challenge."[59]

The foregoing amply illustrates that the implementation of STURAA is substantially related to the governmental objective of remediating past discrimination against women.

CONCLUSION

The narrow issue before the Court is whether the goals and certification process promulgated by the SBA to implement § 502 of the Small Business Act violates the Equal Protection Clause. Amici request that this Court hold that

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oversight for STURAA stated its belief that the Secretary's decision to approve or disapprove a state's request for a reduced goal should be based on, but not limited to, consideration of the following factors: (1) the number of DBE/WBE firms in the state or region; (2) historical data relating to DBE/WBE participation in Federal-Aid highway projects in the state or region; and (3) the minority population in the state or region. S. Rep. No. 387, 100th Cong., 1st Sess. at 12. (1987)

[57] 49 C.F.R., Pt. 23.69(1988).

[58] *Id.*

[59] U.S. Dep't Transp. 1980 DBE Program Manual.

§ 502 is constitutional, and affirm the decision of the Tenth Circuit Court of Appeals. Moreover, if the Court should find that § 502 as applied is constitutionally defective due to the socially and economically disadvantaged administrative presumptions, it should do so only with regard to the presumptions.

Amici do not believe that it is necessary to go beyond a review of § 502. However, if the Court elects to review STURAA, including its statutory presumption in favor of women, Amici urge that an intermediate level of scrutiny be applied to the presumption. This Court has consistently applied this level of scrutiny to classifications based on gender. It should not deviate from this standard here. Applying this standard renders STURAA constitutional.

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